



IN THE HIGH COURT OF SWAZILAND

Criminal case No. 480/2010

In the matter between:

REX

VS

1. MXOLISI KHETHA NKAMBULE

2. NTOKOZO MALINGA

Neutral citation: *Rex vs Mxolisi Khetha Nkambule & Another (480/2010) [2012] SZHC321 (2012)*

CORAM

MCB MAPHALALA, J

Summary

Criminal law – accused charged with murder and robbery – the doctrine of Common Purpose invoked as the basis for criminal liability – prior agreement and active association established – accused convicted as charged.

Judgment
12th October 2012

[1] On the first count the accused were charged with murder and the Crown alleged that on the 22nd July 2010 at Mathendele Township in the Shiselweni region they unlawfully and internationally killed Sifiso Mndzebele acting jointly and in furtherance of a Common Purpose. They pleaded not guilty to the charge.

[2] On the second count the accused were charged with robbery and the Crown alleged that on the 22nd July 2010 at Mathendele Township in the Shiselweni region, the accused acting jointly and in furtherance of a Common Purpose did unlawfully assault Sifiso Mndzebele and by intentionally using force and violence to induce submission did take and steal from him certain property valued at E26, 500.00 (twenty six thousand five hundred emalangeneni), to wit:

- (a) Silver grey VW Golf Motor Vehicle valued at E25, 000.00
- (b) L600 Cellular phone valued E1, 100.00
- (c) E400.00 cash

[2.1] The first accused pleaded guilty to stealing the motor vehicle and not to the charge of robbery; however, the Crown didn't accept the plea. The second accused pleaded not guilty to the charge of robbery.

[3] The post-mortem report was admitted in evidence by consent and it was marked Exhibit 1. The cause of death was due to stab wound to the chest.

[4] Two sets of photographs were admitted by consent. The first set shows the deceased prior to the post-mortem examination as well as the wound inflicted; it was admitted in evidence and marked Exhibit 2. The second set of photographs showed the motor vehicle which is the subject of the second count; it was marked Exhibit 3.

[5] PW1 Nkosinathi Simelane testified that he knew the first accused, and, that he only knew the second accused by sight; he used to see him walking with the first accused. He told the court that on the 22nd July 2010, they were drinking liquor at

Mamkhulu's bar at Mathendele Township with his friends; and, that at about 2300 hours, a motor vehicle came and parked next to the bar. His friends included Mduduzi Dlamini, Wandile Nkonyane, Sunboy whose surname he didn't know as well as the first and second accused.

[6] The motor vehicle was a silver grey VW Golf. The driver signaled to him to come to the motor vehicle. He gave him E10.00 (ten emalangen) and asked him to buy cigarettes for him at Mamkhulu's bar. On his way to the bar, he met both the accused going towards the motor vehicle. Subsequently, the driver came towards him running and holding the left side of his chest. He told him that he had been stabbed and the motor vehicle taken by his attackers.

[7] When he looked at the scene, the motor vehicle was no longer there, and, the first and second accused were nowhere to be seen. Wandile Nkonyane told him that the motor vehicle was now stuck at a nearby ditch. Meanwhile the deceased asked them to assist and transport him to hospital; they walked with him for a short distance but he fell down at the scene of crime.

[8] PW1 saw the motor vehicle a short distance away, and, they went with Wandile Nkonyane to where the motor vehicle was stuck. They found the first and second accused trying to take out the motor vehicle from the ditch; when they could not succeed Wandile Nkonyane took the driver's seat but he couldn't succeed to take out the motor vehicle from the ditch.

[9] The motor vehicle was making a lot of noise; hence, it attracted residents who came to the place. The residents included Xolile Mhlanga and Poppy Mhlanga who were the people that the deceased was visiting in the area when he met his death; they identified the motor vehicle. However, when they realized that the deceased was not there, they went home to call his friend Themba Mhlanga, who was also their brother.

[10] Meanwhile the motor vehicle was subsequently taken out of the ditch. PW1 and Wandile Nkonyane went back to the scene where they had left the deceased; they arrived at the same time with the motor vehicle. The occupants of the motor vehicle were the first and second accused. When the accused saw Themba Mhlanga, they came out of the car and ran away. Themba Mhlanga then drove the deceased to Nhlanguano Health Centre together with Xolile and Poppy Mhlanga; PW1 and his friends remained behind at the bar. During the trial PW1 described and later identified the motor vehicle which was being driven by the deceased.

[11] Under cross-examination, PW1 admitted that the deceased had in fact given him E200.00 (two hundred emalangeneni) and not E10.00 (ten emalangeneni) as alleged in his evidence in-chief. However, he denied as alleged by the defence that upon reaching the bar, he told the second accused that the deceased had given him E200.00 (two hundred emalangeneni) thinking that it was E10.00 (ten emalangeneni).

[12] PW1 reiterated his evidence that when he went to the bar to buy cigarettes, he met both the accused walking towards the motor vehicle; thereafter, he met them trying to take out the motor vehicle from the ditch. He denied that Logwaja Dlamini was an occupant of the motor vehicle with the first accused. He reiterated his evidence that both accused came out of the motor vehicle and ran away when they saw Themba Mhlanga.

[13] PW2 Xolile Mhlanga testified that she knew the first accused since they were attending the same school together; and that the first accused was also in love with her friend. She met the second accused for the first time on the day of the commission of the offence.

[14] She told the Court that she found both the accused at the site where the car was stuck; the second accused was seated inside the motor vehicle; she described the second accused as dark in complexion and his eyes were of different sizes. She further admitted that she knew the deceased, and, that she was his girlfriend. She had

last seen him earlier on the same day when he left Mathendele Township to Mbutfu area to meet his uncle.

[15] On his return the deceased phoned and asked her to meet him at the entrance to the Township so that she could give him directions to her parental homestead. He phoned again shortly thereafter and told her not to come because he had identified the route. After thirty minutes she phoned him because he had not yet arrived, and another man answered the deceased's phone and said she should open the door because he was about to arrive.

[16] She went to sleep and the deceased had not arrived. Thirty minutes later she heard a loud sound of a motor vehicle; she woke up together with her cousin Poppy Mhlanga and went outside the house. They identified the motor vehicle as that belonging to the deceased. They went to the motor vehicle and saw the first accused on the driver's seat trying to remove a car radio using a knife. The second accused was seated on the front passenger seat. She opened the door, and, the first and second accused gave her a nasty look; and, she retreated backwards. The time was about 2300 hours. This was the time when the motor vehicle was stuck in the ditch.

[17] The motor vehicle was lit from inside; hence, she was able to identify them. She asked PW1 for the whereabouts of the deceased; and he said the deceased was inside the motor vehicle. She opened the back door of the motor vehicle and nobody was on the backseat. PW1 was standing behind the motor vehicle with Wandile Nkonyane and two other boys.

[18] Wandile Nkonyane pulled PW2 aside and told her that they should rush to Mamkhulu's bar where they could find the deceased. The bar was three houses away. They found the deceased lying on the ground; PW2 was with Poppy Mhlanga. The deceased was bleeding from the left side of the chest; he was very weak. They rushed to wake up their brother Themba Mhlanga at his girlfriend's homestead nearby; Themba Mhlanga has since died in March 2012.

[19] Along the way they came across the motor vehicle, and, Themba Mhlanga tried to stop it but the driver directed the motor vehicle at him; and, he moved out of the way. They followed the motor vehicle until they found it at Mamkhulu's bar. When they arrived, they found that the deceased had been taken inside the motor vehicle. The first accused was behind the steering wheel and the second accused was on the front passenger seat.

[20] Her brother Themba Mhlanga tried to take the keys of the motor vehicle but the first accused retrieved a knife and threatened to stab him. The first and second accused then abandoned the motor vehicle. She called them by their names Khehla and Mathousand and told them that she had seen them, and, the first accused insulted him. She phoned the police to come to the scene; the police told her that they didn't have transport but they advised her to take him to hospital.

[21] Themba Mhlanga drove the deceased to Nhlangu Health Centre; PW2 was also present. The deceased was still alive; he was immediately transferred to Hlatikulu Government hospital and driven in an ambulance. PW2 accompanied the deceased.

[22] She advised the deceased to phone his parents and informed them about the incident; they came with the police that night. The police also recorded a statement with the deceased. Thereafter, she went back home; the deceased was left with another woman who was looking after him. She returned in the morning since the woman who was looking after him had to fetch her clothes from home. PW2 looked after the deceased until 2030 hours when the deceased told her to go home; on her return in the morning of the third day, she found that he had died over-night. During trial she was able to identify the deceased's motor vehicle; she further identified the first and second accused in court.

[23] She further told the court that the deceased had disclosed to her that he was stopped by PW1 who requested for cigarettes. He gave him E10.00 (ten emalangeni)

to buy the cigarettes because he also wanted them. In the meantime two boys came and told him to alight from the motor vehicle; he tried to close the window but he was stabbed with a knife. The two boys opened the door and pulled him out of the car. He ran to the bar where he reported the incident.

[24] PW2 explained that the deceased had arrived at her homestead the previous day; and, that in the morning PW1 had come to fetch water at her homestead and the deceased had seen him. She reiterated her evidence that he saw the first accused carrying a knife on two occasions: firstly, when he was trying to remove the car radio; and, secondly, when Themba Mhlanga tried to remove the car keys. She further told the court that when the motor vehicle was stuck, she found the first and second accused inside the motor vehicle; Wandile Nkonyane, PW1 and two other boys were standing next to the motor vehicle.

[25] She highlighted that she could identify the second accused because she saw him three times: when the motor vehicle was stuck in the ditch, when the motor vehicle returned to Mamkhulu's bar as well as when the accused ran away and abandoned the motor vehicle. She explained that when Themba Mhlanga tried to take the car keys, the first accused threatened him with a knife and he retreated; the first and second accused then used the passenger door to run away.

[26] PW3 Wandile Nkonyane testified that on the 22nd July 2010 at about 2300 hours he left home to Mamkhulu's bar. He found the first accused with other boys drinking liquor. Fifteen minutes after his arrival, a man came holding his chest and told them that he had been stabbed and robbed of his motor vehicle; the man spoke to him and PW1. Both accused persons had left the bar when this man spoke to them.

[27] They heard the sound of a motor vehicle nearby which was stuck and couldn't move. They went to the site where the motor vehicle was stuck and found the first accused driving the motor vehicle; the first accused was with the second accused who

was seated on the passenger seat. They assisted in pushing the motor vehicle, but, they didn't succeed.

[28] PW3 asked the first accused to allow him to drive the car; PW3 took the driver's seat but failed to remove the motor vehicle from where it was stuck. The first accused took the driver's seat and said PW3 was delaying him; and, he succeeded this time to drive the motor vehicle from where it was stuck. Before the first and second accused drove off, PW2 and Poppy Mhlanga arrived and asked for the owner of the motor vehicle from PW3 and PW1; and PW3 told her that he was at Mamkhulu's bar. The first and second accused then drove off in the motor vehicle.

[29] PW2, Poppy and Themba Mhlanga arrived at the scene and found that the deceased was already inside the motor vehicle; the first and second accused tried to drive off with the motor vehicle but Themba Mhlanga switched off the motor vehicle from outside through the open window and took the keys. The first accused threatened him with a knife and he retreated. The first and second accused came out of the motor vehicle and ran away. Themba Mhlanga drove the deceased to hospital, and, he died three days after the attack. During the trial PW3 identified the motor vehicle from photographs given to him by the Crown.

[30] Under cross-examination PW3 admitted that the deceased did not tell him who had stabbed him. He confirmed that the first accused took out the motor vehicle from the ditch and further drove it away to Mamkhulu's bar. He clarified that the deceased was taken into the motor vehicle by the first accused, PW1, Mduduzi and community members. PW3 maintained his evidence under cross-examination.

[31] PW4 Detective Constable Friday Mabuza, the investigator in the case, testified that on the 22nd July 2010, he was on duty at Nhlanguano Police Station; and he received a report that a person had been stabbed at Mathendele Township and robbed of his motor vehicle. He went to Mathendele Township with other police officers. They were shown the motor vehicle by Themba Mhlanga, and he assisted them in

towing the motor vehicle to the police station; its engine had been damaged when it was stuck at the ditch. The registration of the motor vehicle was DDJ831MP, and it was a VW Golf.

[32] PW4 went to the Hlatikulu Government Hospital to record a statement with the deceased; he found that the deceased was at the theatre and couldn't speak with him. Back at the police station, the first accused surrendered himself to the police. PW4 introduced himself to the first accused as the investigator in the matter. He explained to him his rights to legal representation and to remain silent. Furthermore, he cautioned him in terms of the Judges' Rules that he was not obliged to say anything but that whatever he said would be recorded in writing and used in evidence during the trial. The first accused opted to say something which caused him to be charged for Attempted Murder.

[33] Prior to his death, the police recorded a statement from the deceased at the Hlatikulu Government hospital. After his death the first accused was charged with murder and robbery. During their investigations they found that the first accused committed the offence with the second accused; he was only arrested on the 12th July 2012 at Mashobeni South in the Shiselweni region. They introduced themselves to the second accused and told him that they were investigating the death of the deceased. He was cautioned in terms of the Judges' Rules that he was not obliged to say anything but that whatever he would say would be recorded in writing and used as evidence during the trial. His rights to legal representation and to remain silent were explained to him. At the police station he was cautioned in terms of the Judges' Rules for the second time. He opted to speak; thereafter he was charged with murder and robbery.

[34] Under cross-examination PW4 explained that despite thorough investigation, no exhibits were found other than the motor vehicle. He further told the court that it took long to find the second accused because he was running away from the police; after the incident, he fled to South Africa, and, he was never found at his parental

home at Gege area. PW4 told the court that they even sought the assistance of the South African police at Piet Retief where he was alleged to be working but he couldn't be found.

[35] The first accused decided to give evidence in his defence, and he told the court that on the 22nd July 2010 at about 1030 hours they left Nhlango Town where they were drinking liquor with his friends and went to Mathendele Township at Mamkhulu's bar for further drinking. He was with Sunboy Mamba, Logwaja Dlamini, the second accused and PW1; and, he told the court that PW3 only joined them when they were at Mamkhulu's bar.

[36] A motor vehicle arrived and parked next to the bar, the driver pressed the hooter, and PW1 went to the car and came back with a E200.00 (two hundred emalangi) note; he asked for change and they told him that they did not have change. PW1 then spoke to the second accused who stood up and left. PW1 bought the cigarettes and went back to the motor vehicle; he came back running and told them that the second accused was attacking the deceased.

[37] The first accused together with PW1 and Logwaja Dlamini went to the motor vehicle; before they arrived, they met the deceased who told them that he had been stabbed and was holding his chest. The deceased was with a lady and the second accused was talking to the lady; Logwaja Dlamini went to speak to the second accused. Meanwhile the deceased asked them to take him to hospital; then he heard the motor vehicle driving off from the scene. He was told by Logwaja Dlamini that the occupants of the motor vehicle were the second accused and the lady.

[38] The motor vehicle was stuck in a ditch, a short distance away from the scene. He went to the car together with PW1 and Logwaja Dlamini. The second accused had abandoned the motor vehicle and left with the lady. He took the driver's seat whilst PW1, Logwaja Dlamini and Sunboy Mamba pushed the car. PW3 and Mduduzi Dlamini also joined them in trying to push the car; PW3 also tried to drive out the

motor vehicle but failed, and the first accused took the driver's seat again; and, eventually he succeeded to drive it from the ditch.

[39] The first accused told the court that he drove the motor vehicle back to the bar; and, Logwaja Dlamini was on the front passenger seat. They found Themba Mhlanga, Poppy Mhlanga, PW2 as well as the patrons. He alighted from the motor vehicle and took the deceased to the car so that he could be taken to hospital. Themba Mhlanga asked him who had stabbed the deceased and he told him that it was the second accused. He offered to take the deceased to hospital but Themba Mhlanga refused and said he would drive him since he was his visitor; thereafter, he went back to the bar. However, the owner of Mamkhulu's bar chased the first accused and his girlfriend and told them that their involvement in the death of the deceased was not good for her business because the police would close her bar since it was unlicensed.

[40] They went to a nearby bar at the homestead of Mduduzi Dlamini for further drinking liquor. Thereafter, they went to his apartment in town to sleep together with Logwaja Dlamini. The second accused subsequently arrived and told them that the deceased was stabbed on the chest and that he was likely to die; he further told them that he was considering fleeing the country to avoid police arrest. The second accused disclosed that he had raped the lady at knife point and further paid her money so that she could not report him to the police and further implicate him in the murder and robbery case. After that the second accused left.

[41] On the next day Zanele Dlamini and Lindiwe Nkambule told him that the police came looking for him at his apartment with regard to the killing and robbery of the deceased; and, he surrendered himself to the police.

[42] Under cross-examination the Crown reminded the accused that the defence counsel didn't dispute the evidence of PW1 that when he went to buy cigarettes he met both accused going to the motor vehicle; and, that on his return, he met the deceased who told him that he had been stabbed and robbed of his motor vehicle.

The first accused was further reminded that the evidence of PW1, PW2 and PW3 was not disputed that he was driving the motor vehicle before and after it was stuck in the ditch. He was also reminded of the evidence of PW3 who testified that the first accused had told him to get out of the car because he was delaying him. In addition the Crown reminded the first accused of the undisputed evidence of PW2 that they found him fiddling with the car radio, trying to remove it with a knife.

[43] However, the first accused told the court that it was the second accused who had stabbed the deceased using his Rambo knife, and that after stabbing the deceased, he forced the lady to go with him threatening her with the knife. But he avoided answering to the evidence of PW1, PW2 and PW3 that both the accused ran away after Themba Mhlanga had taken the car keys. Similarly, he avoided answering the question that he threatened to stab Themba Mhlanga when he took the car keys from the car.

[44] The second accused in his evidence in-chief told the court that on the 22nd July 2010, he was drinking alcohol at Ekupholeni bar in Nhlngano with his friends Mxolisi Nkambule, Logwaja Dlamini, Sanele, Mduduzi and PW1; when the bar closed, they went to Mamkhulu's bar at Mathendele Township where they continued drinking. PW3 joined them at Mamkhulu's bar and drank alcohol with them. A motor vehicle arrived and parked next to the bar. The driver rang a hooter, and PW1 went to the motor vehicle and spoke to the driver; he came back with E200.00 (two hundred emalangen) and asked for a change because the driver mistakenly thought he was giving him E10.00 (ten emalangen). They suggested that PW1 went to Mamkhulu for change because they did not have it.

[45] They could see the motor vehicle from the bar and a person standing next to the driver; a girl who was seated on the front passenger seat came out of the motor vehicle running. He went to the motor vehicle to witness what was happening. The first accused was standing outside the motor vehicle holding a knife on the right hand and car keys on the left hand. The deceased was on the driver's seat.

[46] He enquired from the first accused why he was robbing these people, and, the first accused ordered him to bring back the girl so that he would give her the items he had taken from her. He followed the girl and called her to return; they walked back to the motor vehicle. Before reaching the car, they met the deceased who asked for assistance because the first accused had stabbed him and had taken over the motor vehicle. He came closer to the deceased and saw the torn shirt where he had been stabbed on the chest; the first accused was inside the motor vehicle.

[47] The first accused came out of the motor vehicle, and the deceased moved away from the car. The first accused was carrying a knife; and he forced the second accused and the girl to get inside the motor vehicle. The first accused drove the car from the scene but he didn't tell them the destination. He gave the girl her cellphone which he had taken; and, his attention was distracted and the car was stuck into a ditch. The first accused tried to drive out the motor vehicle from where it was stuck without success. The second accused moved out of the car and further opened the door for the girl to move out. He accompanied the girl to her sister's home; however, they were afraid that the first accused would follow them.

[48] Along the way he told her that they should go back to the scene to find out if the deceased had been driven to hospital. When they arrived they found that the motor vehicle had been taken out of the ditch where it was stuck; similarly, they found nobody at Mamkhulu's bar. Thereafter, he accompanied the girl to her sister's place which is next to Emseni bar. He denied raping the girl or that he gave her money not to report him to the police for raping her or to implicate him in the death of the deceased.

[49] He denied that he went to the apartment of the first accused on the morning of the 23rd July 2010 as alleged. After three days he went home to Gege area where he stayed several days before leaving for his workplace in South Africa. He visited home every month-end. He denied that he fled to South Africa after committing the offence.

[50] He was arrested by the police on the 12th July 2012 whilst visiting relatives at Mashobeni South in the Shiselweni region. He told the police during his arrest that the deceased was stabbed by the first accused. On the 13th July 2012 the police took him to Sidvashini Correctional Services at his instance to meet the first accused; however, the first accused told the police that the deceased was killed by the second accused. The police told them that they would fight their case in Court; and, they took the second accused back to Nhlngano Police Station.

[51] Under cross-examination the second accused reiterated his evidence that the deceased was stabbed by the first accused who further robbed him of his motor vehicle; he disputed as false the evidence of the first accused that he stabbed the deceased. He further denied raping the girl and paying her money so that she could not report him to the police. The second accused told the court that the first accused pleaded guilty to theft of the motor vehicle because he had taken the motor vehicle from the deceased forcefully.

[52] The second accused then called DW1, Ncami Khumalo, as his witness. She testified that on the 22nd July 2010, she was a passenger in a motor vehicle driven by the deceased who was her boyfriend. When they arrived at Mathendele Township, the deceased told her that he wanted to meet his friend at the Township before they could proceed to his homestead at Mankayane area; they parked next to a bar, and the deceased opened a window and called his friend Themba Mhlanga.

[53] However, three men came and stood next to the deceased's window and asked for a cigarette; however, the deceased told them that he didn't have a cigarette. One of the men offered the deceased a bottle of liquor but he declined the offer.

[54] One of the three men took out a knife, and, the deceased tried to close the window which was slightly open. At the same time the deceased tried to switch on the ignition, but the car didn't start. One man opened her door and another man

opened the driver's door; they forced them to move to the backseat. The third man disappeared.

[55] The man who was sitting on the front passenger seat demanded cellphones, and she gave them both cellphones. The car couldn't start, and, the man on the passenger seat came out of the motor vehicle to assist the man who was driving because the car couldn't start. The deceased came out of the car running leaving her inside the car; she also went out of the car and ran away, but he was grabbed by the second man who told her that they should go back to the scene.

[56] She last saw the deceased when he came out of the motor vehicle and ran away. The first man driving the motor vehicle asked her to start the motor vehicle; however, she told him that she didn't know how to drive a motor vehicle, and he insulted her. The man subsequently succeeded in turning on the ignition of the motor vehicle; and he drove the motor vehicle from the scene. After a short distance, it was stuck in a ditch. Whilst the man driving the motor vehicle was trying to take it out of the ditch, the second man said he wanted to accompany her to her sister's home; other people arrived at the scene and started pushing the motor vehicle.

[57] She agreed to be accompanied by the man because she was scared and shocked at what had occurred. The man raped her along the way using a condom; she didn't resist because she was scared of the man. She denied that the man paid her money as alleged.

[58] Before they reached her sister's house, the man told her that they should go back because the first accused had stabbed the deceased; and, that they should take him to hospital. According to her, she didn't know at the time that the deceased had been stabbed. She told him that she was scared to go back but the man told her that she shouldn't be scared because all the knives were in his possession including the one used by the first accused to stab the deceased. They didn't find anybody at the scene; on their way back to her sister's house, he raped her again next to the dam.

[59] Before they arrived at her sister's home, he asked her if she could identify him; she told him that she could not identify him in fear that he would stab her. The man left when they reached her sister's home. She only told her sister what had happened on the next morning; she didn't report the incident to the police because she was scared that her attacker would kill her. During the trial she pointed out at the second accused as the one of the three men who attacked her and the deceased and later raped her.

[60] Under cross-examination she conceded that she didn't witness the stabbing of the deceased; however, she emphasized that the three men who attacked them were acting in concert because they assisted each other during the attack; that they came walking together to the motor vehicle; the second accused was the one who opened her door and took their cellphones. She reiterated her evidence that she was scared of the second accused because he was carrying knives.

[61] It is apparent from the evidence of PW1, PW2, and PW3 as well as the evidence of DW1 Ncami Khumalo that the two accused persons attacked the deceased who was in the company of DW1, that the second accused went to the side of DW1, opened the door and demanded cellphones whilst the first accused attacked the deceased. The deceased and DW1 were later ordered to sit at the backseat of the car. The two accused and the third man arrived at the same time and confronted the occupants of the car. According to the evidence of DW1, the three men assisted each other when attacking her and the deceased.

[62] There is evidence that the first accused carried a knife and the second accused also admitted to DW1 that he was carrying a knives. In as much as the first accused pleaded guilty to the theft of the motor vehicle, the evidence clearly shows that force and violence was used in compelling the deceased to submit to the taking of the motor vehicle by both accused persons. The Crown's evidence is undisputed that the motor vehicle was driven from the scene by the first accused until it was stuck in the ditch; the second accused was sitting in the front passenger seat and DW1 at the backseat.

The deceased had moved out of the motor vehicle at the scene when the first accused failed to start the car.

[63] The Crown witnesses together with DW1 corroborated each other that the first accused was driving the motor vehicle when it landed on the ditch, and that the first accused continued driving the motor vehicle after he had taken it out of the ditch. The second accused was sitting on the front passenger seat. PW1, PW2, and PW3 were present when the car was stuck at the ditch; they testified that the first and second accused were the occupants of the motor vehicle.

[64] When the car returned to Mamkhulu's bar, it was still driven by the first accused, and, the second accused was sitting on the front passenger seat. After Themba Mhlanga had taken the car keys, the first and second accused ran away and abandoned the motor vehicle.

[65] Both the accused persons have pointed fingers at each other with regard to the stabbing of the deceased. It is apparent from the evidence that either of them stabbed the deceased as a means of inducing submission to the taking of the car, the cellphone and the money. The Crown's evidence has further established that the accused were acting in concert and in furtherance of a Common Purpose. The evidence shows not only that there was a prior agreement to commit the offence by the accused but that they actively associated themselves in the commission of the offence. The accused do not allege that the deceased was stabbed by a third party; each of them point to the other as the one who stabbed the deceased.

[66] For purposes of the Doctrine of Common Purpose, it is irrelevant who between the two accused stabbed the deceased; it suffices that the Crown's evidence places them at the scene, and each one of them points to the other as the one who committed the offence. The Crown's evidence establishes both a prior agreement to commit the offence as well as Active Association on their part in the commission of the offence.

[67] The Supreme Court of Swaziland in the case of Mongi Dlamini v. Rex Criminal Appeal No. 8 of 2010 approved and applied the South African Appellate Division case of *S. v. Mgedezi and Others* 1989 (1) SA 687 (A) at 705 I – 706 B. His Lordship Farlam JA who delivered the unanimous judgment of the Supreme Court proceeded and stated the following at para 19 of the judgment:

“The principles set forth in that case have been referred with approval by this court in *Phillip Wagawaga and Others v. Rex* Criminal Appeal No. 17/2002 at pp 5-6 of the judgment.

The passage reads:

‘In the absence of proof of a prior agreement, accused No. 6 who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be held liable for those events, on the basis of the decision in *S. v. Safatsa and Others* 1988 (1) SA 868 (A), only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea*; so, in respect of the killing of the deceased, he must have intended them to be killed or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue.’

[68] The evidence shows the existence of a prior agreement by the accused to commit the offences. When the motor vehicle was parked next to the bar, they confronted the deceased, stabbed him and robbed him of his car. In addition they actively associated themselves in the commission of the offence; not only did they attack the deceased together, they assisted each other in bungling DW1 and the deceased at the backseat, took their money and cellphones as well as the motor

vehicle. The requisite *mens rea* for committing the offences is present in respect of both accused persons. Not only does the evidence place them at the scene, they actually perpetrated the attack on the deceased and DW1 by acting in concert with each other.

[69] For the accused to rob the deceased of the car, money and cellphones, it was imperative that they intentionally applied force and violence on DW1 and the deceased in order to induce submission by DW1 and the deceased to the taking of their property. The accused foresaw the possibility of the death of the deceased but they performed their act of association with recklessness as to whether or not death would ensue.

[70] Accordingly, I find both the accused guilty as charged.

[71] The defence submitted that the accused were intoxicated and that the intoxication constituted an extenuating factor. However, the evidence before court is that the accused had been drinking alcohol since late afternoon at Ekupholeni bar in Nhlanguano; thereafter, they moved to Mamkhulu's bar at Mathendele Township. There is no evidence that the accused were intoxicated; hence the issue of intoxication does not arise.

[72] *Holmes JA* in the case of *S. v. Letsolo* 1970 (3) SA 476 (AD) at 476-477, His Lordship stated the following:

“Extenuating circumstances have more than once been defined by this court as any facts, bearing on the commission of the crime, which reduce the moral blameworthiness of the accused, as distinct from his legal culpability. In this regard a trial court has to consider:

(a) Whether there are any facts which might be relevant to extenuation, such as immaturity, intoxication or provocation, (the list is not exhaustive);

(b) Whether such facts, in their cumulative effect, probably had a bearing on the accused's state of mind in doing what he did.

(c) Whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did.

In deciding (c) the trial court exercises a moral judgment. If its answer is yes, it expresses its opinion that there are extenuating circumstances.”

[73] The above case followed a decision of *Schreiner JA* in the case of *Rex v. Fundakubi and Others* 1948 (3) SA 810 (A) at 815. It has been followed and applied in various cases including *S. v. McBride* 40/88 (1988) ZASCA 40 (30 March 1988) at para 31 and 32; *S. v. Theron* (1984) ZASC, 1984 (2) SA 868 (AD) at 878; *S. v. Ngoma* (3) SA 666 (AD) at 673; *S. v. Masuku and Others* 1985 (3) SA 908 (AD) at 913F; *S. v. Ndwandwe* 1985 (3) SA 222 (AD) at 227E-F; *Philemon Mdluli and Others v. Rex* 1970-1976 SLR 69 at 75D (CA); *Mbuyisa v. Rex* 1979-1981 SLR 283 at 285 (CA); *Rennie Bernard v. Rex* 1987-1995 (1) SLR 201 at 207h (CA); *Mbhamali v. Rex* 1987-1995 (3) SLR 58 at 62h (CA).

[74] In the circumstances I am unable to find any extenuating circumstances in the matter.

[75] In mitigation of sentence, the first accused submitted that he is a first offender, that he surrendered himself to the police, that he was gainfully employed prior to his arrest, and that he was 24 years of age when he committed the offence. He is single and has no children. He was arrested on the 23 July 2010 and has been in custody since then.

[76] The second accused is a first offender as well, single with two minor children born out of wedlock, he was gainfully employed before arrest in Piet Retief South Africa in a Forest / Timber company; he was arrested on the 12th July 2012 and has

been in custody since then. The accused was twenty two years of age when he committed the offence.

[77] In considering the appropriate sentence, I will take into account the triad, that is the personal circumstances of the accused, the interests of society as well as the seriousness of the offence. The accused are still relatively young, and, they are first offenders; they deserve to be given a chance to reform. However, this should not override the fact that they have been convicted of a serious offence involving Robbery and Murder.

[78] I will invoke section 15 (2) of the Constitution and not impose a death penalty in light of the personal circumstances of the accused. Accordingly, I sentence the accused to twenty six years imprisonment for the count of Murder and five years imprisonment for Robbery; the sentences will run concurrently. The sentences of the first accused will commence on the date of arrest on the 23rd July 2010; and the sentence of the second accused will commence on the 12th July 2012.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT

For Crown
For First Accused
For Second Accused

Principal Crown Counsel S. Fakudze
Attorney Ms Mazibuko
Attorney L. Ngcamphalala