



## **IN THE HIGH COURT OF SWAZILAND**

**Criminal Trial No. 404/2011**

In the matter between:

**REX**

Versus

**MBUSO NKOSINGPHILE MAMBA**

**Neutral Citation:** *Rex v Mbuso Nkosingiphile Mamba (404/2011) [2013]*  
*SZHC 188 (9<sup>th</sup> August 2013)*

**Coram:** **ANNANDALE J**

**Heard:** 19<sup>th</sup> March to 11<sup>th</sup> July 2013, various dates.

**Delivered:** 9<sup>th</sup> August 2013

**Summary:** *Murder – Persons involved – Participants – Perpetrator(s) (Common Purpose) – Accomplice (Furtherance) (Complicity in actus reus) – Distinctions between – Status of current Criminal Law – S v Thebus followed.*

## **JUDGMENT**

[1] The tragic death of the Late Tekaya Mdlovu yet again brings to the fore that violence against defenceless women remain a constant scourge in the society which we live in. The alarming rate at which women are wantonly abused, maimed, tortured and killed is an indictment of homophobic men who deem themselves as superior in gender but act in a manner unbecoming of the human race. Intolerance and disrespect of the values of human life, in particular that of our mothers, daughters and sisters, too often result in the funerals of loved ones who died for no cogent reason at all.

[2] In this particular matter, the deceased ended up by being buried in a shallow grave, no deeper than knee height, after having been

whipped and strangled, for no other reason that “just having been there”. She looked for no trouble, gave no trouble and did nothing at all to deserve meeting her fate, buried face down underneath a few shovels of dirt.

[3] The twist in the tale is that the evil man behind her murder is a fugitive of justice who left behind a young man who fell under his influence and power, now to face prosecution all by himself. By all accounts, the culpability of the senior partner in crime by far exceeds that of the remaining accused before court. The young man did relatively much less than his associate, one Sanele Computer Mbhekeni Kunene, in the process of murdering the victim and disposal of her body, yet it is the degree of participation that ultimately leads to his conviction.

[4] As is the usual norm, his attorney argues that he should be absolved from any wrong doing while the crown wants his head. As shown below, the evidence not only justifies but requires a conviction. The only legal issue to decide is the basis for a conviction of murder

— that of an accessory or an accomplice or a perpetrator acting in common purpose with his now absent former friend and mentor.

[5] The very brief background to the matter, to which I shall soon revert in more detail, is that early in October 2011, the accused and his friend “Computer” Kunene were at the latter’s residence in Logoba, near Manzini. After some drinking and the arrival of visitors, for seemingly no logical reason at all, Kunene became agitated with the deceased, apparently an *ad hoc* live in lover, and chased after her with a sjambok.

[6] Possibly tired of hitting and chasing her, he gave the sjambok to the accused, Mbuso Mamba, to continue with his evil deeds. Soon thereafter, Kunene took a rope, described as a “red and black woollen sash” ( Exhibit G), and proceeded to stangulate the woman, while inside his house

[7] Thereafter, he called for a hired car which took them to the rural homestead of Kunene, quite some distance away. Their victim was carried to the car and placed between them for the journey, dripping

blood onto their clothes, which were later destroyed by fire. Very close to their destination, the deceased was taken out of the car and left close to the roadside, within some sort of forest, said to be because of the bad state of the road, ostensibly soon thereafter destined to be taken by Kunene to a traditional leader further up the road.

[8] The party, *sans* the deceased, then went to the nearby parental homestead of Kunene where they spent the night. The following day, they went to Mbabane for some errands, after incinerating their bloodied apparel. In due course, the police got wind of the crime and following the arrest of Mamba and Kunene, the shallow grave was pointed out and the rest, as they say, is history.

[9] Controversy surrounds the role of Mamba, the young man now before court, all by himself after the disappearance of Kunene. When the trial initially was to have commenced, both were to be jointly prosecuted on the basis of having been accomplices acting with a common purpose. Notably, it focusses on the whipping of the victim, her subsequent strangulation and her being dumped in the

plantation close to the homestead of Kunene. Also, whether or not he assisted in the burial of the deceased and his movements at the homestead, both after the dumping of the body and during the pointings out, in addition to his awareness of her state of life when the woman was placed in the car and later on removed from it.

[10] From the onset, it must be noted that by all accounts, the accused seems to have been most unfortunate in having been a party to the murder. He did not personally want her to be killed and he had no quarrel with her. It appears that he looked up to Kunene as senior to him, of good standing and being a protégé to some extent. When not at his own parental home, he regarded Kunene as some sort of person acting as *locus parentis* whom he met at a church, who would look after him when the need arose but at the same time, he seemed to be apprehensive of the man, not wanting to alienate their friendship and also reluctant to disregard what he was told to do, such as going on midnightly errands. It seems to me that they had a cautious friendship, albeit that Mamba retained his autonomy but reluctant to exercise it, to his own detriment.

- [11] I did not gain the impression that he blindly followed commands but rather that he acted out of his own will and convictions, even though influenced by the elder Kunene. At the time of the crime he was by all accounts an independant young man, soon to turn eighteen, who befriended Kunene for the sake of convenience, often stayed over at his house and obliged himself to be an underling to perform menial tasks when so required.
- [12] At the same time, he tried his best to impress this court as also being a responsible person who cared for others, especially for the late Thekaya Mdlovu, a young man who asserted his independence and autonomy against Kunene. He repeatedly stated that he refused to do as told and that he did all he could to refrain from causing her any harm. Despite his youthful age he conveyed himself as one with sufficient maturity to stand his ground, on his own feet.
- [13] Throughout the trial, it never transpired that his youthfulness at the time when Ndlovu was murdered diminished his criminal capacity to any extent. Both his cognitive dand conative mental capacity, the ability to distinguish between right and wrong and his ability to act in

accordance with it, seems to be on par with any normal adult person. Nothing to the contrary has transpired during the course of the trial to cast any doubt about it, nor was it so argued by his counsel. To this court, it did not require any professional expert to enquire and opine about his criminal capacity due to youth or any other determinant. His age was stated to be just below eighteen at the time the murder took place.

[14] Further, the accused before court displayed and portrayed a cogent and detailed knowledge of wrongfulness as to the killing of the deceased. He repeatedly stated how much he wanted the ending of the fateful episode to be different. There remains no question as to the fact that he very well knew how wrong it is to cause the death of another, particularly in the absence of justification in whatever form.

[15] From all of the evidence adduced by the crown during the course of the trial, no other conclusion can be drawn other than that Tekhaya Mdlovu was brutally murdered during the night of the 5<sup>th</sup> October 2011. The act of murder cannot by any measure be found to have been culpable homicide, negligence being the key factor. There was



no unforeseeable consequence. To the contrary, a person subjected to the cruel punishment that she received could hardly have been expected to survive her ordeal.

[16] Only conjecture and speculation might suffice to postulate that if only she was immediately after the assault taken for emergency treatment by qualified specialists in intensive care, she might have survived. Nobody can *ex post facto* say so, and in reality, nobody endeavoured to suggest so either.

[17] The only options for doubt as to the time of death could possibly be that maybe she could still have been alive at the time she was carried to the hired vehicle which took the party away from the scene. Even if still alive when she was unceremoniously dumped at the roadside, some hours later, she at most had no chance of remaining alive for any reasonable period thereafter.

[18] Although it remains unknown as to exactly when she was buried in a shallow grave, it could not have been for more than only a few hours

thereafter. In any event, the exact moment of death is non-determinative in the outcome of this trial.

[19] The pathologist determined that she died as a result of “asphyxia as result of pressure over neck”. If she was buried while still alive, it is rather unlikely that her cause of death would have been stated thus.

[20] In his observations, the pathologist listed a host of injuries which were sustained by the victim. Apart from some four abrasions situated on her upper body, the centre of injuries were suffered on her face and neck. These terrible injuries are consistent with the evindence as to how she was attacked. After beatings with a sjambok, she was strangulated with a sash or rope.

[21] The finding of this court is that she was whipped and strangulated to the extent that she died as a direct result thereof, even though it is impossible to determine definitively whether she was already dead by the time she taken away from Logoba, or whether she died thereafter, before being buried in an attempt to conceal her whereabouts.

- [22] That the conduct of the perpetrators was wrongful again bears no gainsay. The legal convictions of the community could never countenance the dastardly act as to the manner in which she died. *Ex post facto*, and objectively, there is no possible excuse for killing her in the manner which caused her death. The conduct was clearly wrongful.
- [23] The knowledge of wrongfulness and causation which accompanied her murder and the degrees of participation in the crime form the nub of this trial. The accused before court is charged as having “acted jointly with one Sanele Computer Kunene, a fugitive of justice, in furtherance of a common purpose in the unlawful and intentional killing of Tekhaya Mdlovu.”
- [24] It is common cause, when all of the available evidence is given due consideration, that Kunene took the lead and that his wrongful actions were the primary cause of the death. He is not on trial anymore, following his abscondment while out of custody, released on bail. He is also not prosecuted *in absentia*.

- [25] The remaining question to decide is whether the doctrine of common purpose is to be applied in this trial and if so, whether a conviction of Mamba should follow.
- [26] The doctrine of common purpose was unknown in Roman and Roman Dutch Law — our Common Law — but imported via English law, following annexation of the Cape, and it subsequently also found application in our Kingdom. A main reason for the acceptance of this doctrine, which is mostly applied in murder trials but not limited thereto, is due to the difficulties experienced in proving which individual out of more than one participant actually caused the death of the deceased. (See Snyman, Criminal Law at p. 258). Criminal liability is based on an imputation of the acts of all the participants to each other, but *mens rea* of one participant is never imputed to another. (See S v Kwadi 1989 (3) SA 524 (NC)).
- [27] Dove-Wilson JP formulated this doctrine in the following terms in R v Garnswarthy 1923 WLD 12:

*“Where two or more persons combine in an undertaking for an illegal purpose, each of them is liable for anything done by the other or others of the combination, in the furtherance of their object, if what was done was what they knew or ought to have known, would be a probable result of their endeavouring to achieve their object. If on the other hand what is done is something which cannot be regarded as naturally and reasonably incidental to the attainment of the object of the illegal combination, then the law does not regard those who are not themselves personally responsible for the act as being liable...”*

(Emphasis added — See also Visser and Vorsters General Principles of Criminal Law through the Cases, 3<sup>rd</sup> Ed. Butterworths at p 690 et seq.).

[28] In Philip Magwaga Ngcamphalala and 7 Others v Rex, Criminal Appeal No. 17/2002, Tebbutt JA admirably sets out the application of the doctrine and I quote extensively from the judgment, in which the relevant authorities are referred to, from page 3 *et seq.*:

*“ The essence of the doctrine of common purpose is that where two or more persons associate in a joint unlawful enterprise each will be responsible for any acts of his fellows which fall within their common design or object (see the judgment in the South African case of S v Safatsa 1988 (1) SA 868 (AD), which has been followed in several cases in this Court e.g. Patrick Wonderboy Ngwenya v Rex Cr. App 25/1999. See also S v Mgedze and others 1989 (1) SA (1) 687 (A) ). The crucial requirement is that the persons must all have the intention to commit the offence ... There need not be a prior conspiracy. The common purpose may arise spontaneously. Nor does the operation of the doctrine require each participant to know or foresee in detail the exact way in which the unlawful result will be brought about (See S v Shezi 1948 (2) SA 119 (AD) at 128 J S v Trosane 1951 (3) SA 405 (O) at 407; S v Nhiri 1976 (2) SA 789 (RAD) at 791).*

*It is however, necessary for the Crown to establish that each participant had the necessary mens rea (see S v Malinga 1963 (1) SA 692 (A) at 694; Safatsa's case at p 200 J). It must be shown that he or she knew or must have known that the crime was likely to be committed by one of his associates and either participate therein or agreed, by words or conduct, to associate himself with the act or acts of his associates. The test is summarised succinctly by Burchell and Hunt: South African Criminal Law and Procedure Vol. 1 (General Principles) 2<sup>nd</sup> Edition pp 434 – 435 as follows:*

*“Proof, whether by evidence of words or conduct, of agreement to participate in the criminal design, added to proof of participation, and directly or by necessary implication of contemplation of (possible) consequences, irrespective of the particular means by which they were attained (coupled with recklessness as to whether those consequences occur or not), provides the proper test in law of the liability of parties to a common purpose.”*

*It must be emphasised that mere presence at the commission of a crime does not in itself constitute an implied common purpose with the actual perpetrator or perpetrators. The Court must be satisfied that an accused person had a common intention with members of a group which perpetrated an unlawful attack and was not a mere spectator, even an approving one. (See S v Mgedze and Others supra at 702H). The Court must therefore analyse and consider the evidence against each individual accused alleged to have acted in common purpose with another or others.*

*The necessity to examine the evidence adduced by the prosecution against each individual was adverted to in Barnabas Magawana and 15 Others v State, unreported but referred to in R v Kgolane and Other 1960 (1) P.H. H110 and approved in State v Macala and Others 1962 (3) SA 270 (A) at 273 – 274. In the Magawana case van Winsen JA said at 274 A – B:-*



*“Where the state can bring no evidence that the accused took part in the actual assault resulting in the death of the deceased, but seeks to rest its case upon the fact that the accused made common cause with the actual killers it must prove beyond reasonable doubt that the accused had a common intention to kill and that in execution of that intention they became members of the band of killers. While it is true that, depending upon all the circumstances of the case, the mere presence of an accused at the scene of a killing may afford prima facie evidence of their being members of the band of killers all of whom entertained a common intention to kill, yet, in the particular circumstances of the case, their mere presence there does not afford such proof.”*

*This view of the position in regard to common purpose has been stated with equal clarity in the recent case in the South African Appellate Division of S v Mgedzi and Others supra. The headnote in that case reads as follows:*

*“ In the absence of proof of a prior agreement, an accused who was not shown to have contributed causally to the killing or wounding of the victims (in casu, group violence on a number of victims) 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 victims. 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, 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.

*Inherent in the concept of imputing to an accused the act of another on the basis of common purpose is the indispensable notion of an acting in concert. From the point of view of the accused, the common purpose must be one that he shares consciously with the other person. A “common” purpose which is merely coincidentally and independently the same in the case of the perpetrator of the deed and the accused is not sufficient to render the latter liable for the act of the former.” (Emphasis added).*

[29] Reverting to the matter at hand, the evidence thus requires, in addition to the usual requirements which have been dealt with above, to meet the further five criteria as adumbrated in Mgedezi (*supra*), before the doctrine of common purpose can find application.

[30] Firstly, the accused was uncontrovertedly, and by his own account, present at the scene where the violence was being committed. The deceased was chased from the house where the attack occurred.

[31] During the evening of the 5<sup>th</sup> October 2011, Mr. Mdzebele (PW2) was at the house of Computer Kunene. He testified (that the deceased wanted to go to her home and when she asked for her cellphone from the accused before court, Kunene turned on her and assaulted her with a sjambok. When done, he handed the sjambok to the accused and told him to also beat her as she is “naughty.” This witness tried to stop the beating but both Kunene and Mamba took her outside.

[32] Although it was put to him that the accused instructed his attorney that he did not beat the woman but instead tried to help and assist her, this witness would have none of it and reiterated that both men assaulted the woman and that he was the one who tried to help her but failed. His evidence remains effectively unchallenged and there is no room to doubt the truthfulness of what he said.

[33] To dispell the notion that a single witness might have had a distorted recollection of events or that he might even have twisted the truth, Mr. Mbuso Ngwenya (PW3) corroborated the events to a great extent. The only material difference is that from his vantage point, he could not actually see the beating. He re-affirmed that Computer Kunene was the instigator and that he hit the woman with a sjambok, but he could not see, from his vantage point, when Mamba took over. He heard Kunene telling Mamba to also assault the woman and heard her pleas to be left alone and go home. Importantly, at the time he heard the whipping sound, after the accused was given the sjambok by Kunene, it was only the victim and the accused who were outside at the time.

[34] His evidence was also not challenged or disputed to cast any doubt as to its veracity.

[35] That this evidence suffices to place the accused at the scene of the crime is self evident. Both witnesses left positive impressions with this court and I have no misgivings about their veracity — they gave

honest and reliable evidence as to what they observed with no indentation of their credibility.

[36] Their evidence also serves to satisfy the first four requirements of the application of the common purpose doctrine as per Mgedezi, *supra*. Not only was the accused aware of the assault on the victim but he actively participated in it, making common cause with Kunene in so doing. He further manifested his sharing of a common purpose by himself actively participating in the assault by using the sjambok and hitting the woman, displaying his association with the conduct of Kunene.

[37] The evidence of the accused is not plausible or worthy of serving to absolve him from the crime. He had an inordinately long time to rehearse his evidence while in detention, from October 2011 up to June 2013. Over decades as presiding officer, I have seldom heard such a well renditioned oratory of self serving innocent behaviour.

[38] In his very long-winded soliloquay, Mr. Mamba was at pains to emphasise, repeatedly so, his grave humanitarian concern for the poor

woman who was single handedly assaulted by his friend and mentor, Kunene. He portrayed himself as the protector of the weak who repeatedly tried to ward off the uncalled for attack on the defenceless victim, failing in all his efforts. Of course he distances himself from any untoward behaviour and adamantly insists that he never raised a finger against her.

[39] He was however at a loss to explain away the incriminatory evidence by credible witnesses who had it to the contrary. His misplaced self righteousness particularly surfaced in his stated concern, every so often, at the time after the victim was dumped in a plantation close to the parental homestead of his now absconded friend, Kunene.

[40] His heart rendering performance sought to convey sincere compassion with an “injured” woman left by herself in the bush while his friend was to take her to a traditional healer for help. Meanwhile, their party had to travel quite some distance to reach their destination, in the process passing various hospitals and clinics where first aid was readily available, albeit for injured and not dead people.

- [41] The young accused was also well prepared for anticipated questions in the course of cross examination and had his well rehearsed answers readily available. However, he made a dismal impression as witness. There is no hesitation to hold that although his evidence is actually based on the true events, it is selectively skewed and tainted to conceal his active involvement in the horrific murder of their victim.
- [42] Insofar as his evidence contradicts that of the accepted evidence adduced by the witnesses called by the prosecution, it is emphatically rejected.
- [43] However, his marathon rendition served to fill some gaps in the chronology of events. This is particularly so with the strangulation of their victim which was only evidenced by the pathologist's report. Mamba gave a detailed account of how Kunene fetched a sash or red and black woollen rope (Exhibit "G") which was used by Kunene to strangle the woman.
- [44] Over and above the hideous injuries to her face, graphically depicted in photographs which were taken when her body was exhumed from



her shallow grave, Dr. Reddy noted injuries due to “intermingled contused abrasion over chin to neck front” and “on dissection, contused area on both sides of neck, below thyroid cartilage”. With the cause of death having been determined as “Asphyxia as result of pressure over neck”, the missing pieces of the puzzle were provided by Mamba in relation to Kunene’s averred strangulation by using a rope or sash.

[45] Again, his own role in the strangulation is very much downplayed but as it is the only and uncontroverted evidence about the strangulation, it remains to be accepted. Of course Kunene may be termed as a convenient scapegoat, not present before court to cast the light at any different angle, but nevertheless there is no reason to reject this aspect of Mamba’s evidence.

[46] There are two further scenarios where the active participation and association with the murder of Mdlovu comes to the fore. These relate to the conduct of the accused when their victim was placed into a hired car at Logoba and when she was later taken out of it and dumped in a plantation.

[47] Mr. Benjamin Magagula (PW 1) testified as to how it came about that he went to the house of Kunene, where the victim was loaded into his car, and their subsequent journey to where she was dumped. He operates a “for hire” or Taxi service and reluctantly responding to a late night call, arrived at the house of Kunene soon after midnight. He was to assist in the taking of “sick person to a clinic”.

[48] He said that the accused and Kunene carried the body of the sick person, covered in a blanket, to his car and that she was placed on the back seat between the two while a further female got into the front (my emphasis). To the contrary, the accused was at pains to insist that she actually walked to the car, assisted by him and Kunene by merely holding her arms. As all along in his evidence, the picture he sought to convey is that the deceased was fine, with no serious injuries, she only needed to be helped along to the traditional healer which Kunene spoke of.

[49] The evidence of the Taxi man further served to show that the victim was held erect by the two men alongside her, Kunene and Mamba.

During the diverse stops *en route*, she was held erect by one man while the other alighted from the vehicle.

[50] Most damning is his evidence as to how the accused and Kunene unceremoniously carried her from the car into the bushes, once they almost completed their journey. The driver and the female passenger remained in the car until the two men returned, but without their victim. Thereafter, very close by, he left his passengers at Kunene's parental homestead.

[ 51] The remainder of the evidence focusses on how the deceased was found, what happened during the rest of the night at the homestead, who pointed out what and also some inadmissible evidence as to utterances said to have been made by the accused. In his own evidence, the accused also referred to the burning by fire of some items, such as his own clothes and the blanket in which the deceased was covered.

[52] Even though adverse inferences from the further evidence could be drawn against the accused, it is not necessary to go any further. For

instance, the pointing out of the shallow grave by Kunene and Mamba, who were handcuffed together, leaves a number of alternative options to be concluded, not only that the accused actually knew where she was buried, nor that he assisted in digging the grave. Similar inferences as to why he burned his clothes leave more than just one conclusion to be drawn from it, other than that he wanted to conceal evidence. Also pointings out at the homestead remain open for more than only one adverse conclusion.

[53] In all fairness to the accused, those aspects should rather be negated and not interpreted as to proof of his guilt. Nor is it necessary to do so, since the remaining body of incriminating evidence suffices to satisfy this court that his guilt has already been sufficiently proven, beyond any reasonable measure of doubt.

[54] The fifth criterium as set out in Mngedezi (*supra*), assimilated with approval in Phillip Ngcamphalala (*supra*) by the Appeal Court of Swaziland, requires that *mens rea* on the part of each participant must nevertheless be proven by the prosecution if a common purpose is to be established, sufficient for a conviction.

- [55] Each participant who is accused of the commission of the crime must have foreseen the possibility of their victim being killed and have performed his own act of association with recklessness as to whether or not death was to ensue.
- [56] *In casu*, the accused before court actively associated himself with Kunene, who by all accounts is the man who took the lead and was most instrumental in the murder, and on whose initiative the body was disposed of far away from the initial place where the assault and strangulation occurred. Mamba also hit her with the sjambok and he was no mere innocent bystander or casual observer when she was strangled. Thereafter, he helped to carry her to the car in which they conveyed their victim, to be dumped and left abandoned while they continued to their destination.
- [57] By no measure other than ignoring the facts, could it be said that Mamba did not pertinently associate himself with Kunene. He also actively participated in the causing of injuries and disposal of her body. At minimum, he must have foreseen that his involvement in the crime could well lead to the death of the woman, but with reckless

disregard of the consequences, he nevertheless continued to participate, at least up to the stage where her pitiful body was dumped in the bush.

[58] It is with all of the above evidentiary material and by application of law that this court is fully satisfied that the guilt of the accused has been been sufficiently proven to dispel any reasonable doubt. Accordingly, the accused is convicted as charged, of the crime of murder, having acted with a common purpose with one Sanele Computer Kunene, a fugitive of justice.

**JACOBUS P. ANNANDALE**  
**JUDGE OF THE HIGH COURT**

**For the Crown** : Mr. T. Dlamini  
**For the Accused** : Ms. Mazibuko (Pro Deo)

**[ NOTE: Proceedings on sentence postponed to obtain a pre-sentence report by a probation officer. ]**

