



IN THE HIGH COURT OF ESWATINI
JUDGMENT

CASE NO. 44/10

HELD AT MBABANE

In the matter between:

REX

Versus

MBONGENI MAZWI MNGOMETULU

1st ACCUSED

NOMSA NOBUHLE SIMELANE

2nd ACCUSED

Neutral Citation: *Rex vs Mbongeni Mazwi Mngometulu [44/10] [2020]*

SZHC 80 (30 April, 2020)

Coram: LANGWENYA J

Heard: 3 October 2019; 2 December 2019; 16 March 2020; 19 March
2020

Delivered: 30 April 2020

Summary: *Criminal Law-Criminal Procedure-Accused charged with
-plea of not guilty-common purpose alleged-Crown
evidence on behalf of the first accused not challenged-first accused*

that defence
consent does
that an
established to have been
is placed upon it in

*confession statement entered by consent-the fact
Counsel consented to admission of statement by
not excuse the trial judge to satisfy herself
admission/confession was properly
admissible in evidence before reliance
convicting the accused.*

viva
co-

*Criminal Procedure-first accused's confession against the
second accused is inadmissible-evidence of first accused
voce against the second accused is admissible against his
perpetrator.*

uncontroverted, it
accused's guilt.

*Criminal Procedure-the second accused asserted her right to
silence-there is prima facie evidence against the second
accused-where prima facie evidence left
might be found to be sufficient proof of*

requirements of
accused persons

*Criminal law-Criminal Procedure-Both accused charged with
murder in furtherance of a common purpose-
doctrine of common purpose discussed. Both
found guilty of murder.*

JUDGMENT

[1] The first and the second accused were indicted for the crime of murder, it being alleged that on 27 June 2009 and at or near KaNzameya area in the Shiselweni district, the said accused persons each or all of them acting

jointly in furtherance of a common purpose did unlawfully and intentionally kill Mfanukhona Charles Mthupha.

[2] When the charge was put to both accused persons, they pleaded not guilty.

[3] The Crown led the evidence of six witnesses to prove its case.

[4] The first accused led evidence in support of his case and did not call witnesses.

[5] The second accused asserted her right to remain silent and closed her case without calling witnesses.

The Case for the Crown

[6] The first witness for the Crown is Liphlinah Simelane. She is the mother of the first accused person and resides at Mooihoek area with the first accused. On 29 June 2009 in the evening hours, she was at home seated with her children in the kitchen. The first accused was also present in the kitchen. The first accused person's phone which was on loud speaker rang and he went outside to answer it. PW1 could hear that on the other side of the phone the voice of a female was talking to the first accused. PW1's evidence finds support in the evidence of the first accused who stated that in the evening

hours while he was at home the second accused called him and asked him to come over to where she was.

- [7] Immediately after taking the call, the first accused disappeared. PW1 and her other children retired to bed without the first accused being home. PW1 saw the first accused on the following day when he was going to work. The first accused returned home early from work at around 8am and informed PW1 that he only went to work to collect his wage. The first accused took a bath and went to Hlathikhulu.
- [8] After the first accused had gone, police officers came and asked to see the first accused. They asked to search first accused's house. Inside first accused's house the police retrieved a baton (*siqwayi*), inside the mattress they found the clothes of the first accused to wit: a sweater, pants, a jacket and a backpack. They also took a maroon bed frill. Present when the police conducted their search was Samson Khumalo-a community police member. Samson Khumalo is dead now.
- [9] When the first accused returned home, PW1 asked Elphas Simelane to take him to the police. The first accused was arrested by the police at his home before he could be taken to the police station. PW1's evidence is that the first accused pointed out a bush knife, baton and a hat to the police officers.

- [10] PW2 is Nondumiso Mthupha. The deceased and the second accused are the parents of PW2. On 25 June 2009, PW2's parents had gone to the shops to buy groceries. On return, she met them and helped carry the groceries. The deceased remained behind at a certain shop and did not come home that day.
- [11] The deceased only came home the following day at around 9pm. He knocked on the door and the second accused opened the door for him. The deceased came inside the house and sat on the couch. He said he was hungry. The second accused said there is no food and that he should go back to where he had been. The deceased ate avocados and mixed them with onion and tomatoes. When he started to eat, the second accused took the food away from the deceased. Deceased grabbed the dish. Deceased got upset and took a knobkerrie as if to hit the second accused (*wamsikita ngaso*). The deceased then took the dish and ate his food. From this evidence, the initial aggressor in this domestic quarrel is the second accused.
- [12] The deceased asked for salt. The second accused told him to go back to where he had been. The deceased tried to assault the second accused with the knobkerrie and the second accused took a broomstick and assaulted the deceased with it and it broke. The second accused fled out of the house and the deceased followed her but did not reach the gate. No sooner had the deceased returned to the house than he left to look for the second accused but did not find her. The deceased spent about twenty minutes looking for the second accused outside. He returned to the house and ordered PW2 and her siblings to go to bed. The deceased then switched off the lights and retired to bed.

- [13] The deceased was asleep when the second accused knocked on the door. PW2 opened the door for the second accused. The second accused slept with PW2 and the other children in the sitting room. The sitting room is adjacent to deceased's bedroom. The second accused was busy on her phone when PW2 fell asleep.
- [14] PW2 was woken by deceased shouting for help and saying he was dying. According to the evidence of PW2, the deceased asked the second accused to give him his bush-knife which was under the sofa. PW2 says the second accused tried to open the door to deceased's bedroom but someone pushed the door from inside deceased's bedroom. This evidence of PW2 must be juxtaposed with the evidence that the first accused asked to be given a bush knife when the bush knife he was using fell while he held the deceased by the neck and was pressing him to the floor. In his uncontroverted evidence in chief, the first accused said the second accused entered the bedroom with a bush knife. The second accused later threatens PW2 with death if she so much as told anyone that she went inside deceased's bedroom.
- [15] To my mind the second accused did not so much take the bush knife to the bedroom in aid of the deceased as much as in aid of the first accused person. It is unlikely that the second accused would not want it to be known that she went to the bedroom when the deceased was under attack if her reason of going there was to help the deceased. If the second accused's intentions were

noble, there was therefore no reason to threaten PW2 with death if she told the police that the second accused went inside deceased's bedroom at the time deceased was being attacked.

[16] While the deceased was being attacked, PW2 says the second accused did nothing to help him. She did not raise an alarm when the deceased was under attack. According to PW2, second accused only screamed for help 5-10 minutes after PW2 had left her home to raise an alarm at PW4's home. When PW2 attempted to leave the house to go and raise an alarm, she was stopped by the second accused who asked her to wear shoes. When PW2 wanted to run outside to raise an alarm, the second accused held her back by her hand. PW2 bit the second accused's arm to free herself from her grip and she ran and raised an alarm.

[17] PW2 went to raise an alarm at PW4's homestead. She was at PW4's gate crying for five to ten minutes before the second accused came running and crying. The second accused explained that there were two balaclava clad people killing the deceased at home. The reality however is that it was the first accused with the help of the second accused who attacked the deceased on that fateful night.

[18] It is the evidence of PW2 that on previous occasions the first accused came to her home at night. The first accused was introduced to PW2 and to her siblings by the second accused as their uncle. The first accused would sleep in a one room house at her home. The second accused would go and spend

time with the second accused leaving PW2 and her siblings in the main house. The accused persons were lovers.

[19] PW2 told the Court that whilst growing up she and her siblings would share food with the deceased. This changed when the second accused told them not to eat or drink *emahewu* reserved for the deceased. Although PW2 does not give a reason why they were warned against sharing food with the deceased, there is some explanation from the evidence of PW3. PW3 states that the second accused once told her that she wanted to poison the deceased for falling in love with someone else. The second accused is said to have stated that she wanted to put poison in *emahewu* of the deceased. The only catch, she said, was that her children were prone to drinking the said *mahewu* reserved for the deceased.

[20] PW3 is Emmelinah Manyatsi-Dlamini. She is a friend of the second accused. She told the Court that the second accused once confided in her that she wanted to poison the deceased because the deceased was now in love with someone else. PW3 counseled the second accused against poisoning the deceased and she said she was no longer going to poison him.

[21] On the night deceased died, the second accused called PW3 at around 9pm and asked her to load E40.00 airtime for her. She did. Later on the same night, PW3 heard that the deceased had died. When she got to second accused's home that night and enquired from second accused on what had happened, the second accused looked at PW3 and smiled.

- [22] During cross examination, PW3 was unshaken in her response that the second accused had, on the fateful night asked for airtime; that she smiled when PW3 enquired about the death of the deceased; and on the fact that on an earlier occasion the second accused had intimated that she wanted to poison the deceased.
- [23] PW4 is Samukeliso Austin Nhlabatsi. On the fateful night, he heard PW2 and the second accused raising an alarm. PW2 was asking her father to wake up. The second accused said there were people who were killing the deceased. PW4 went to the scene and found the deceased lying in a pool of blood. When he called the deceased he did not respond. He told certain women who were walking to deceased's home to phone the police.
- [24] PW5 is 3135 Detective Constable Petros Hlatshwayo and a scenes-of crime officer. On the night in question he received a report of a case of murder at KuDumako/KaNzameya area. He proceeded to the scene where he found police from KuDumako police post as well as community members guarding the scene. The scene was a two roomed house. He went to the bedroom and found the lifeless body of the deceased who lay in a pool of blood. The deceased body had multiple gaping wounds on the head, back and on the left arm. The bed of the deceased was soaked in blood. There was also a bush-knife with a black handle next to where the deceased lay. The bush-knife was soaked in blood. He took photographs of the scene.

[25] The doors of the house were intact as they were not damaged. This means there was no forced entry into the house. There was no blood splatter inside the house. The glass of the bedroom window was shattered but the window was shut. This evidence must be contrasted with the evidence that after the first accused had murdered the deceased, he went out of the house and bashed the glass of the window to make it look as if someone had broken into the house. This, first accused says in the statement he made before the magistrate. Exhibit 'A' and photo 2 shows a window that is shut but has its glass partially broken.

[26] During cross examination it was put to PW5 that an intruder might have entered the bedroom through the broken window. It was put to PW5 that the intruder might have used a wheelbarrow that lay on the far side of the house to climb into the house through the broken window. PW5 stated that there was no indication the wheelbarrow was used by the intruder on that fateful night as it had no fingerprints. PW5 stated that his observations were that whoever entered the bedroom did not do so through the window. PW6 stated that on the broken window there were no signs that a person had climbed into the bedroom through the broken glass window.

[27] With the benefit of hindsight the Court now knows entry into the bedroom was gained through the door. Photo 13 shows the partially broken window with blood stains on the outside of the house. There is evidence before Court to the effect that after the deceased was injured, the first accused went

outside the house and bashed the bedroom window to make it look as if someone had broken into the house. PW5 stated that the bedroom window was damaged from outside the house because there were blood splatters on the window which showed that whoever broke it used an instrument which had blood.

[28] PW5 later requested the pathologist to extract blood samples from the deceased for DNA profiling. A forensic report was compiled and it was handed into Court by consent and marked exhibit 'D'. The result of the DNA analysis of the blood samples taken from the deceased were matched with blood stains found in the clothes that were worn by the first accused on the fateful night. This independent evidence places the first accused at the scene of the crime.

[29] The post mortem report was handed in by consent and was marked as exhibit 'B'. According to the post mortem report, the deceased died as a result of multiple injuries. The body of the deceased had the following injuries: (1) cut wound on the forehead to right scalp 8x12cm, in the parietal region 9x12cm at the back of the scalp to neck 12.5x5.1cm over left eyebrow 7x1.3cm left cheek 8x1.3cm, cheek to left ear 14x3.4cm bone deep involved scalp, skull, vault, nose, cheekbone, jaws with mixed intracranial haemorrhage over brain; (2) cut wounds over left upper limb 6.2x2cm, 8x3cm, 8x4.5cm bone deep; (3) cut wound over left-flank outer aspect 9x1.7cm muscle deep; (4) cut wounds over back trunk left 3x2cm,

5x2.1cms, 4x2cm, (lower region 4.5cm to 7.2cmx3.7cm bone deep) muscle deep; (5) cut wound over back of right shoulder 8x1.4cm bone deep.

[30] By consent a statement made by the first accused before a judicial officer was handed in and it was marked exhibit 'C'. Exhibit 'C' is a detailed account of events pre, during and post-the death of the deceased.

[31] The forensic examination report was also handed in by consent and marked exhibit 'D'. Exhibit 'D' states that the blood specimen taken from the deceased matched the blood that was found in the clothes worn by first accused on the night the deceased died. This independent evidence places the first accused at the scene of crime.

[32] PW6 is 3685 Detective Inspector Sibusiso Vilane. He is the investigating officer in this matter. On 27 June 2009 and at around 0300hours he received a report of murder at KaNzameya. Acting on the report, he with 4929 Sergeant Delisa Mavuso went to the scene of crime where they found police officers from KuDumako police post and residents guarding the scene of crime.

[33] He and the other police officers entered inside a two room house which had a sitting room and a bedroom. He went to the bedroom where he found the

deceased lying next to the bed with multiple cut injuries all over the body. On the floor was a bush-knife in a pool of blood.

- [34] The glass of the bedroom window was broken and there was broken glass inside and outside the window. There were blood stains on the window. PW6 inspected the point of entry at the door and there was no sign of forced entry. There was also no sign that someone had climbed over the window.
- [35] The second accused was taken in for questioning after due caution in terms of the Judges' rules. She said something. The second accused directed the police to the first accused's homestead. This evidence was not challenged. At first accused's homestead, the police found PW1 and first accused's younger brother. The first accused was not at home. After introducing themselves as police officers and explaining their mission to PW 1 in the presence of an independent witness-Samson Khumalo and PW1, the police went to the first accused person's house and conducted a search.
- [36] Inside the house of the first accused, the police retrieved a black plastic and a baton with blood stains. PW6 lifted the mattress and in between the mattress he found a grey jean pair of trousers with blood stains, an army green sweater with blood stains and a maroon and white bed frill with blood stains as well as a pair of white grass hopper shoes with blood stains. All the items were taken as exhibits.

[37] The police went to Hlathikhulu with the second accused where she was detained pending further investigations. On 28 June 2009 the police returned to the parental home of the first accused. PW1 and the first accused were found at home. The first accused was standing next to the door of his house when the police arrived. The police introduced themselves to the first accused and explained their mission. They told the first accused they were investigating a case of murder. They cautioned the first accused in terms of the Judges' rules. The first accused said something. After due caution the first accused pointed out a bush knife which had blood stains as well as a woolen hat. The first accused was arrested and charged with murder. The second accused was also charged with murder. The first accused later made a statement before a judicial officer at Nhlanguano Magistrate Court.

[38] During cross examination, PW6 stated that he was not aware that charges against the second accused were withdrawn. According to this witness, if charges were withdrawn, they were also reinstated by the prosecution.

[39] At the close of the case for the prosecution, the second accused moved an application for discharge in terms of section 174(4) of the Criminal Procedure and Evidence Act 1938. The application was dismissed and reasons stated in open Court on 19 March 2020.

[40] It is important to point out that none of the Crown witnesses was cross examined on behalf of the first accused; this means their evidence was

unchallenged by the first accused. Exhibits A, B, C and D were all entered as evidence by the Crown with the consent of the accused persons.

The Case for the First Accused-DW1

[41] The first accused started off by apologizing to the relatives of the deceased and all concerned for the death of the deceased. He stated that it was not his intention to kill the deceased. He said he was misled and used by the second accused. He said the second accused used him to further her interests. The first accused said to show that he was sorry for what he did he co-operated with the police. In a tone devoid of emotion, the first accused told Court that if he could bring the deceased to life, he would. Unfortunately, he said, that was not possible.

[42] It was the evidence of DW1 that on the evening of 26 June 2009 he was called on his phone by the second accused. The second accused told DW1 that she had a problem and that he should come to her as soon as possible. The first accused says the second accused asked him to come and get her suitcase from her bedroom where the deceased lay as she wanted to leave the deceased. DW1 stated that the second accused left the door unlocked so that DW1 could gain easy entry into the house and into the bedroom. The suitcase, it was stated by the first accused, was next to the bed in the bedroom. That the door was indeed left unlocked is corroborated by the evidence of PW5 and PW6 who both stated that there was no forced entry into the house.

[43] It is the evidence of DW1 that when he got inside the bedroom and pulled the suitcase, the deceased woke up and ran towards the bed. How the deceased could have run towards the bed on which he lay is unclear. The deceased pushed the accused against the wardrobe. Where the wardrobe was situated is unclear because the photos of the scene of crime do not show a wardrobe in the bedroom, least of all a suitcase next to the bed inside the bedroom. Un-meritoriously neither- this or any other aspect of first accused's case was put to the Crown witnesses.

[44] The Court was told deceased fought the first accused. The injury marked as 2 in the post mortem report reflect that the deceased suffered bone deep injuries on his left arm. Photo number 3 and photo number 7 show the deep cuts on the left arm and left hand of the deceased. In my view, if the deceased fought the first accused, it was a one sided fight since the first accused did not suffer any injury and he made no reference to suffering injuries during the 'fight.' In all likelihood, the deceased was butchered in his sleep- that is, if the pool of blood on the bed is anything to go by.

[45] In an effort to escape from the deceased's clutches- the first accused told Court- he wrestled with the deceased until they got to the bedroom door. The first accused took out a bush knife and a baton from his backpack and hacked the deceased with the bush knife on the face. Deceased could not see properly as he was bleeding. The deceased slipped and fell. In his evidence in chief, the first accused stated that the second accused got into the

bedroom with a bush-knife. He did not tell the Court why it was necessary to go into the bedroom with weapons if the intention was simply to take a suitcase.

[46] The defence of private defence does not avail the first accused. He had no business entering the private space of the deceased knowing that the deceased was at home. The first accused was not under any unlawful attack from the deceased when he inflicted injuries on the deceased. There was no fight between the deceased and the first accused on the night in question. The first accused, with the help of the second accused attacked and killed the deceased while the latter was asleep in his house.

[47] After killing the deceased, the first accused fled from the scene and returned to his parental home. At his parental home, he took off the clothes he was wearing and went to Hlathikhulu to collect his pay cheque.

[48] The first accused told PW1 about the offence he committed KuDumako. PW1 requested Mr Samson Khumalo to take the first accused to the police on the following day. The police came and arrested the first accused before he could be taken to the police by Samson Khumalo.

[49] DW1 was taken to Hlathikhulu police station. He pointed out the clothes he was wearing when he committed the crime charged. He says he was taken to

Nhlangano Magistrate Court where he was threatened with death with a firearm if he did not make a confession before a judicial officer. Who exactly threatened the first accused is unclear from his evidence.

[50] It is the evidence of the first accused that when he made the confession, it was in the presence of police officers one of whom was PW6. It was DW1's evidence that Magistrate Nxumalo came with the police to make him record a statement. In the confession statement, Magistrate Nxumalo states that before he recorded the statement from the first accused, he 'took steps to ensure that no police officer was within sight or hearing distance of the said Mbongeni Mazwi Mngomezulu and that no one other than the interpreter Miss Tenele Mkhabela was present in my office. The door was closed.' This was not challenged by the first accused as the statement was entered by consent.

[51] The first accused says he was put into a room by the police at Nhlangano Magistrate Court and told to say all what happened failing which they would kill him. One of the police officers had a firearm around his waist. It is the evidence of DW1 that he was made to say everything he said on the pro forma and in the confession statement. Needless to point out the first accused's *viva voce* evidence in Court is an about turn of what he recorded before the Magistrate. I reject as false the belated 'new' version of threats allegedly visited on the first accused by the police for the following reasons: first, this was not put to PW6 whom the first accused alleges was present

when he was made to record the confession before the Magistrate. Second, the first accused says he co-operated with the police while they investigated this matter-it is unclear therefore why the police would resort to threatening him with death. The first accused through his Counsel agreed to the statement he made before a judicial officer being entered into the Court record by the prosecution. In the confession, the first accused says no force or inducement was brought to bear on him to make the statement. He recorded the statement before Mr. Nxumalo in the presence of Tenele Mkhabela who was the interpreter.

[52] That the accused and his Counsel consented to the admission of the statement made by the first accused before a judicial officer does not excuse the trial judge to satisfy herself that an admission or confession was properly established to have been admissible in evidence before reliance is placed upon it in convicting the accused¹. It is the duty of the judicial officer at the end of the trial to evaluate all the evidence. It is at this stage when the Court has to reconsider evidence which was tendered and to deliberate whether, in law, it is indeed admissible in order to rely on it to convict. I am satisfied that the confession made by the first accused was made freely and voluntarily in accordance with the law.

[53] The confession has a level of detail quite inconsistent with a person fabricating a false confession under threat of harm. The confession also contains information which the first accused would not have known if he

¹ *S v Nkosi* 1980 (3) SA 829(A) page 845B-C.

were not a perpetrator. The first accused acknowledged that he assaulted the deceased with a bush knife. His confession about assaulting the deceased with a bush knife is consistent with the pathologist's report which details the injuries suffered by the deceased and concluded that he died due to multiple injuries.

[54] There is accordingly no basis in law for this Court to discredit any of the Crown witnesses (and other evidence presented by the Crown) on aspects of their evidence which was left unchallenged in cross examination. To the contrary, evidence that only emerged during the testimony of the accused might be criticized for having the making of an afterthought, or being fabricated evidence.

[55] During cross examination, DW1 said he did not tell the magistrate he had been threatened by police because he was the one who was wrong. He said he was wrong because he went to the home of the deceased and inflicted the fatal injuries on the deceased. The first accused has not told the Court why the police would threaten him if he cooperated with them and admitted, as he did before court- that he inflicted the injuries that resulted in the death of the deceased.

[56] During cross examination, the first accused denied that the second accused agreed to assist him enter into the house when deceased was asleep and attack him then. In his evidence in chief, the first accused stated that when

the second accused requested him to go inside her house and get her suitcase from the bedroom, he enquired how he would gain entry since houses are locked. In his oral evidence in Court the first accused stated that the second accused said she would not lock the door to the house. This was to enable the first accused to gain easy entry into the house. If this was not assisting the first accused enter the house, I don't know what it is. Accordingly, I reject as false first accused's denial that the second accused did not assist him to enter the house in which the deceased slept.

[57] When it was put to DW1 that there was no fight between him and the deceased because he did not tell the magistrate about a fight; his response was 'I get you'. DW1 stated that he assaulted the deceased with a bush knife on the face when he had woken up. When DW1 was asked why he told the magistrate he found the deceased fast asleep, his answer was 'I get what you are saying there is nothing I can say'.

[58] It was put to the first accused that he asked the second accused to bring him another bush knife as he held the deceased by the neck and assaulted him countless times until he stopped putting up a fight. First accused's response was 'I get you, there is nothing I can say.'

[59] It was the evidence of the first accused that there was no discrepancy between the evidence he gave in Court and what he said in his confession. Nothing could be further from the truth.

[60] It was further put to DW1 that at around 1am of that fateful night, the second accused sent him a text message to tell him to come in as the deceased was now asleep. The first accused's response was there is nothing I can say to that and no comment. DW1 further had no comment when it was put to him that he armed himself with a bush knife and a baton because he wanted to use same on the deceased.

[61] It was the evidence of DW1 that he was tempted and was used by the second accused to commit the offence charged.

[62] It was while he was being cross examined by Mr. Nzima on behalf of the second accused that the first accused stated that he was never cautioned before he was arrested, charged and fingerprinted by the police. It was at this stage that for the first time the first accused denied he was informed by the Magistrate he was not obliged to say anything to the magistrate. The reality is that in the confession and on the form preceding the confession this and other questions were posed to the first accused and he responded to them as stated therein. In particular the judicial officer states that he informed the accused that he is a judicial officer and that the accused is not obliged to say anything unless he wishes to do so but that whatever he says will be recorded in writing and might be used in evidence at his trial.

[63] The police who investigated the matter gave evidence in this case. They detailed how the first accused was arrested. The first accused did not challenge their evidence during cross examination. The law in this regard is settled. Accused's failure to put important aspects of his case to the prosecution's witnesses may place his case at risk of adverse comments being made and adverse inferences being drawn. Equally, if the accused subsequently goes into the witness box and denies the evidence in question, the Court may infer that he has changed his story in the intervening period of time².

[64] There is no explanation why the evidence of Crown witnesses was not challenged by the first accused. There is also no evidence why the documentary evidence of the Crown was not challenged by the first accused- this includes the confession statement. In line with the authority cited above, the first accused is, in my view reconfiguring or recalibrating his case and this means the Court should draw an adverse inference regarding his denial of the contents of the confession statement.

[65] It is important to point out that once a co-accused takes the witness stand, what he says *viva voce* is admissible evidence against his co-perpetrator. This is what happened in *casu* and first accused's evidence as a witness is admissible against the second accused. That evidence does not only place the second accused at the scene, it also shows her role in the commission of the offence charged.

² *The King v Dominic Mngomezulu* High Court Criminal Case No. 94/1996.

[66] On the contrary, the law is clear that a confession made by an accused person is not admissible against his co-perpetrator³.

[67] As stated earlier, evidence that only emerges during the testimony and cross examination of the accused might be criticized for having the making of an after- thought or being fabricated evidence.

The Case for the Second Accused

[68] The second accused chose to exercise her constitutional right not to testify. She also did not lead evidence from other witnesses.

[69] However, it is said that where there is *prima facie* proof of the accused's guilt, as I found there is *in casu*, the election of the accused not to testify, although not presupposing that an adverse inference can be drawn against the accused per se, entails certain consequences for the accused. One of those consequences is that *prima facie* evidence left uncontroverted, might be found to be sufficient proof of the accused's guilt⁴.

³ Section 228 of the Criminal Procedure and Evidence Act, 1938 states that 'No confession made by any person shall be admissible as evidence against any other person.'

⁴ *S v Brown and Another* [1996] All SA 625(NC); *S v Boesak*

[70] The Constitutional Court in South Africa in *S v Boesak* per Langa DP stated as follows in that regard:

‘The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a Court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence.’

[71] It is common cause that there is no direct evidence *per se* that links the second accused to the death of the deceased. The second accused, the Court heard texted the first accused to tell him he could come into the house as the deceased was now asleep; the second accused left the door open for the first accused to gain easy access to the bedroom in which the deceased was sleeping; she did nothing to help the deceased when he was attacked; She entered the scene of crime with a bush knife to aid the first accused; she tried to stop PW2 from going to raise an alarm while the deceased was under attack; she threatened PW2 withdrawn if she told anyone that second accused entered the bedroom where deceased was murdered; she misled people that it was two people who attacked the deceased; she led the police to the parental home of the first accused. The Crown’s case of second accused’s involvement in deceased’s death rests on circumstantial evidence.

[72] The Supreme Court of Appeal in *S v Cwele & Another*⁵ per Mpati P, stated as follows with regard to the assessment of circumstantial evidence:

⁵ 2013 (1) SACR 478(SCA).

‘In S v Reddy & Others 1996 (2) SACR 1(A), this Court said the following regarding assessment of circumstantial evidence:

‘In assessing circumstantial evidence, one needs to be careful not to approach such evidence upon a piecemeal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by the accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in R v Blom 1939 AD 188 at 202-203 where reference is made to two cardinal rules of logic which cannot be ignored. These are first, that the inference sought to be drawn must be consistent with all the proved facts and secondly, the proved facts should be such ‘that they exclude every reasonable inference from them save the one sought to be drawn.’

‘The State must therefore satisfy the Court, ‘not that each separate fact is inconsistent with the innocence of the (appellants), but that the evidence as a whole is, beyond reasonable doubt inconsistent with such innocence.’

[73] Prior to deceased’s death the second accused had planned to poison the deceased. She later abandoned the plan. On the evening in question, the second accused started a fight with the deceased and later fled her house.

[74] While outside her house, she called the first accused and asked that he come over to where she was. PW1 confirmed that the first accused received a call in the evening hours and spoke to a female voice. PW1’s evidence in this regard is confirmed by the first accused. The Court was told by the first accused that the second accused asked him to go inside the bedroom, ostensibly to get her bag, while the deceased was present and asleep in the bedroom.

- [75] The first accused was armed with a bush knife and a baton when he entered the bedroom where the deceased was sleeping. It is unclear why it was necessary to carry the lethal weapons inside the bedroom if the aim was to take a suitcase out of the bedroom.
- [76] The second accused left the door unlocked. The first accused gained easy entry into the house. It was not denied by the first accused that at around 1am the second accused sent him a text message informing him that the deceased was now asleep.
- [77] While the deceased was being attacked, the second accused went inside the bedroom with a bush knife. The second accused later threatens PW2 with death if she so much as tells anyone that the second accused entered the bedroom. If second accused's intention of going inside the bedroom was noble, why threaten PW2?
- [78] The second accused was present inside the house when deceased was being attacked. She did not raise an alarm while the deceased was being attacked. In the words of PW2 she did nothing to help the deceased. The second accused only raises an alarm when the first accused had left the scene and was raising an alarm at PW4's homestead. That was five or ten minutes after PW2 had fled from the house. Even then, the second accused conveyed misleading information as she told PW4 that two people came and attacked the deceased.

[79] It was suggested that PW2's evidence is actuated by the desire to get all her father's terminal benefits to the exclusion of the second accused. Absent the version of the second accused it is difficult to understand how PW2, who appears to have acted impulsively when she bit second accused and ran outside to raise an alarm could be the sole beneficiary of her father's estate when she said she had other siblings seared by the deceased.

[80] From the above, it is clear that the second accused was present when the violence against the deceased was committed; the second accused was aware of the assault on the deceased as she was present in the house; She intended to make common cause with the first accused who was the perpetrator of the violence; She manifested her sharing of a common purpose with the first accused by leaving the door unlocked; bringing the bush knife to the bedroom; and failing to raise an alarm timeously while the attack was ongoing. Consequently, the second accused had the requisite *mens rea* concerning the unlawful outcome at the time the offence was committed-she intended the criminal result or foresaw the possibility of the criminal result ensuing and nevertheless actively associated herself reckless as to whether the result was to ensue⁶.

[81] Her conduct of leaving the door unlocked for an armed intruder to enter, means that she must have at the least, foreseen, the possibility of the

⁶ *S v Safatsa & Others* 1998 (1) SA 868(A); *S v Mgedezi & Others* 1989 (1) SA 687; *Thebus & Another* 2003 (2) SACR 319 (CC).

deceased dying and nevertheless, associated herself recklessly as to whether the criminal result would ensue and it did. Alternatively, the second accused ‘acted wrongfully in the criminal sense’ by not taking steps such as raising an alarm timeously to prevent imminent death of the deceased. By so doing, the second accused was reckless as to whether the deceased would die⁷. Accordingly second accused made common purpose with the first accused and assailant, at the least on the basis of *dolus eventualis*.

[82] Both accused persons contributed to the death of the deceased. The doctrine of common purpose is outlined in *S v Safatsa and Others*⁸ as well as in *S v Mgedezi and Others*⁹. The requirements of the doctrine of common purpose are met in the present case in that: both accused persons were present at the scene when the deceased was hacked with a bush knife and died of his injuries; the accused persons were both aware of the assault perpetrated against the deceased; the second accused made common cause with the first accused by giving him a bush knife to continue with the assault of the deceased; the accused persons must have foreseen the possibility of the deceased being killed but continued with their unlawful act, reckless whether death was to ensue.

[83] In light of the above facts and law, the uncontroverted evidence presented by the Crown, and there being no other evidence to compare it with, the Crown

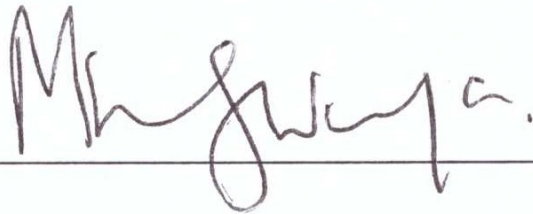
⁷ *Musingadi & Others v S* [2010] 4 All SA 274 (SCA) at 42.

⁸ 1988 (1) SA 899(A).

⁹ 1988 (1) SA 687.

has proved its case against the first and the second accused beyond reasonable doubt.

[84] Accordingly each accused is found guilty of murder and is convicted as charged.

A handwritten signature in black ink, appearing to read 'M. Langwenya J.', is written above a horizontal line.

M. LANGWENYA J.

For the Crown:

Mr. K. Mngomezulu

For the First Accused:

Mr. X. Mtetwa

For the Second Accused:

Mr. O. Nzima.