

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CRIMINAL CASE NO. 349/2013

In the matter between

The King

V

Bongani Dlamini

1st Accused

Mphumelelo Ndwandwe

2nd Accused

Celimphele Dlamini

3rd Accused

Neutral citation: *The King v Bongani Dlamini & 2 Others* (349/13) [2022] SZHC 198 [2022] (19/09/2022).

Coram : Tshabalala J

Heard : 23/03/2020

Delivered : 19/09/2022

Summary: Criminal law – murder. Three Accused set out to attack the deceased at his home. One of them fatally stabbed the deceased with a sharp object.

Held: The Accused persons acted in furtherance of a common purpose and therefore are guilty of murder, with a finding that the degree of intent was in the form of dolus eventualis.

JUDGEMENT

- [1] The Accused persons are charged with murder it being alleged that:

“...upon or about the 15th February 2015 and at or near Mhlosheni, Emakhatsaweni in the Shiselweni Region, the said Accused persons each or all of them acting in furtherance of a common purpose, did unlawfully and intentionally kill one Sibusiso Mlamuli Zungu...”

- [2] When the trial commenced on the 17th July 2019, the court was informed by Defence Counsel, and the Crown Counsel confirmed that Accused 2, Mphumelelo Ndwandwe had since passed on. Trial therefore proceeded only against Accused 1 and Accused 3 (Bongani Dlamini and Celimphilo Dlamini, respectively). They both pleaded not guilty to the charge.
- [3] The Crown led the evidence of 7 witnesses: PW1, Dr RM Reddy, PW2 Sihle Mhlanga, PW3 Sifiso Lwazi Hlatswako, PW4 Thando Mshayina Dlamini, PW5 Dr Samuel Ayan, PW6 6411 Constable Mpendulo Kunene and PW7 Detective Sergeant Earnest Sibiya.
- [4] PW5, Dr Samuel Ayan was a medical doctor stationed at Hlatikulu government hospital. On the 15th February he examined and treated the deceased Mlamuli Zungu who had been referred to the hospital from Matsanjani health centre with a history of a penetrating wound on the abdomen caused by a sharp object. The patient who was brought by police was taken to theatre immediately. PW5 noted the following injuries, among others: 3cm long and deep wound on the right flank, perforation of ascending colon, perforation of traverse colon, bowel content mixed with blood. The

patient subsequently died on the 18th February 2015. PW5 compiled a death summary which was handed in as Exhibit "B".

[5] PW1, Dr RM Reddy was police pathologist based at police Headquarters in Mbabane. He conducted post-mortem examination on the body of the deceased Mlamuli Zungu on the 25th February 2015 at Hlatikulu government hospital.

[6] PW1 established that death resulted from complications of abdominal injuries. He noted the following four anti-mortem injuries on the body of the deceased:

- 2cm sutured wound on the right centre of chest
- 4cm x 2cm cut wound the lower back
- Cut wound on lower abdominal region
- Sutured wound on the front of abdomen

[7] PW1 completed a post mortem report which was admitted by the court as exhibit "A" which reflected complications consequent to abdominal injury as the cause of death, as stated by PW1.

[8] Defence Counsel put it to PW1 under cross examination that his instructions were that only one wound was inflicted on the deceased. In response PW1 could not rule out the possibility that during treatment, the surgeon might have created the sutured wounds in order to treat internal injuries. PW1 noted that the surgeon¹ referred to one injury on the abdomen, which according to PW1, was the fatal injury.

¹ PW1 made reference in this instance to Exhibit "B" prepared and handed in by PW5.

- [9] PW2 Sihle Mhlanga was 23 or 24 years old in February 2015. She lived with the deceased who was father of her child. On the night of the 15/02/2015 the deceased, who had been away during the day, took a bath and then relaxed. While PW2 and the deceased lounged in their room with their infant, they heard a knock at the door, from people who identified themselves as police, but turned out to be A1, A2 and A3 who were all well-known to PW2. When the deceased and PW2 did not open for them, they broke the lock and forcibly opened the door. The deceased responded that he was still getting dressed. When PW2 tried to get out, one of the Accused told her to stay in the house because she did not have to see what was going to happen. PW2 nonetheless exited the house with baby on her back. Deceased followed her out.
- [10] Outside the house the Accused had positioned themselves on either side of the door, A1 and A3 on the right and A2 on the left. On his exit the deceased fled to the left side, and all three Accused chased after him. According to PW2 A1 carried what appeared to be a spear.
- [11] PW2 went to seek help from neighbours as well as phoned members of community police. One Dlamini, Lungile Mhlanga and Sifiso Hlatjwako came to the scene. The deceased was found lying in the field injured. National police were called and deceased was taken to Nhlangano health centre, from where he was immediately transferred to Hlatikhulu government hospital.
- [12] PW2 denied under cross exam that the Accused merely knocked at the door and invited deceased to come out to talk. She denied that deceased responded to the Accused that when he came out he was going to kill

somebody. PW2 did not see if the deceased carried anything because he came out after her.

[13] PW2 took care of deceased in hospital until he succumbed to his injuries four days later.

[14] PW3 Sifiso Hlatjwako who was one of the people PW2 enlisted their help when the deceased was attacked confirmed that PW2 came to his home in the dead of the night, and reported the attack to him and his mother. PW3 whose home was nearby to that of the deceased heard the latter's screams. PW3, his mother and PW2 went to the scene and found deceased lying in the field, injured. Community police came and eventually national police, who took the deceased to hospital. The deceased was injured on the right side of abdomen. PW3 subsequently recorded a statement at Hluthi police station.

[15] PW3 testified that earlier in the day, prior to the horrific incident, he and others including the deceased were drinking at a Mavuso homestead. A tractor driven by Mgcibelo Dlamini passed by pulling a trailer loaded with river sand. On the trailer were Mgcibelo's sons, A1, A 2 and A3 and other young men. PW3 and one Lindani stopped the tractor and requested a ride, but was declined. When the tractor moved the occupants threw river sand on PW3 and Lindani. The two went back to Mavuso's and reported the offensive act to their drinking buddies. The latter, excluding the deceased, took it upon themselves to punish the boys by pelting stones at the moving tractor.

[16] PW3 and the group followed the tractor further up to Shamaze bus stop at Mageza area where the mob intensified the stone attack against the Accused,

forcing the driver and those on the trailer to flee and seek refuge at a nearby Xaba homestead.

- [17] PW3's evidence is that the deceased who had remained at Mavuso's drinking spot came at this stage and tried in vain to calm down the mob. Deceased then left the mob for his home, around 19:00 hours. The mob then vandalized the abandoned tractor. PW3 said he then left the scene and went home to sleep.
- [18] The highlight of PW3's evidence is that around 21:00 – 22:00 hours A1, 2 and 3 entered his house and found him sleeping. A1 shone a cell phone torch on him and asked him where the battery was and also where his friends were. PW3 could not assist with both inquiries whereupon Accused 1 assaulted him with a slap on the face after which the Accused persons left. PW3 went back to sleep, until later when he was interrupted by PW2 and his mother with the report of attack at deceased's home, as narrated above.
- [19] PW3 was taken to task under cross examination concerning his evidence that the Accused visited him at night and assaulted him. It was put to him that he was fabricating and that he could not have identified the people who entered his house due to darkness. PW3 stuck to his evidence and was certain that the Accused were the ones and that the cell phone torch light was sufficient for him to see who they were.
- [20] PW4 Thando Mshayina Dlamini was part of the group referred to by PW3 that was enjoying traditional brew at Mavuso's in the company of the deceased. However, PW4 claimed that he was the one who asked for a ride from Mgcibelo Dlamini's tractor trailer on which the Accused persons were riding. That it was him and Linda not PW3 who were declined a ride.

According to PW4 the animosity and attack directed by the drinking group towards the trailer occupants arose after Lindani climbed on to the trailer without permission. Those on the trailer responded by assaulting Lindani. The assault angered the group that was drinking at Mavuso's, who reacted by pelting stones at the tractor.

- [21] Apart from the discrepancy on who between PW3 and PW4 asked for a ride on the tractor, there is no dispute that the Accuseds' tractor was subjected to stone throwing and that they were followed up to Mageza area where they had to hide at Xaba's, and that their tractor was vandalized. PW3 and 4's evidence is also in agreement that the deceased did not part-take in any of the attacks, and that he only attempted to get the mob to desist from the acts of violence. The duo's evidence concerning the deceased is further that he departed from the scene at Mageza early after failing to calm the mob down.
- [22] PW4 owned up and took responsibility for vandalizing the tractor. He testified that he and the rest of the violent mob fled to the bush when Mgcibelo Dlamini's employer, the white man who owned the tractor came to the scene. PW4 and party observed from their hiding spot in the bush when the owner inspected his tractor with the help of headlights from his motor vehicle.
- [23] Both PW3 and PW4 denied suggestion under cross-examination that while the Accused were hiding in Xaba's homestead the witnesses and their group threatened to go and destroy Accused's home and hurt the family members. The two witnesses' testimony is that from Mageza, they dispersed to their respective homes.

[24] PW6, Constable Mpendulo Kunene was on night patrol on the night of 15th February 2015 when he and colleague received 999 hotline report of a stabbing incident at Makhadzateni, Mhlosheni area. They rushed to the scene where they found community police, PW3, PW2 among others. The deceased who was injured lay in the field, in a pool of blood unable to talk. They transported him to Nhlengano health centre. PW6 opened a case of assault with intent to cause grievous bodily harm (AGBH) and referred it to the Criminal Investigation Department.

[25] PW6 stated under cross examination that he did not find any axe next to the deceased and that he knew nothing about it.

[26] PW7, Detective Sergeant Earnest Sibiya was the investigating officer for AGBH case that was upgraded to murder following the demise of the victim. On the 16th February 2015 he arrested A2 (the late Mpumelelo Ndwandwe) at Mageza. A2 had no injuries, but looked ill, and did not report any injuries. PW7 denied knowledge that at the time of arrest A2 was from hospital where he went for treatment for a head injury. However, he admitted under cross examination that A2 had bandages around his head.

[27] PW7's evidence was that A1 was arrested on the 17th February 2015, during the second police visit to the village. He said that he cautioned A1 in terms of the Judges' Rules after which the latter took him to a house at his home where he retrieved a 6-10cm long knife.

[28] PW7 was taken to task under cross examination by suggestions that the evidence of pointing out was improperly obtained because he did not caution the suspect and that the suspect had been assaulted during interrogation, the claims which PW7 refuted.

[29] It was put to PW7 that A1 pointed out the knife that had been shown to him by A2, and that the latter told him that he had used it to stab the deceased in self-defence against attack with an axe.

Defence case

[30] A1 and A3 gave evidence in their defence, as DW1 and DW2 respectively, and called no further witnesses. The two defence witnesses' testimony was more or less the same on material facts. A1 testified that his home area was Makhadzateni, but resided at Nhlangano. At the time of the incident, he resided at Nhlangano where he was employed by FTM Garments since 2010, the firm he still worked for at the time of his evidence.

[31] A1 recounted events of the day in February 2015 when he together with A2, A3 and four other young men returned from fetching river sand, and were aboard a trailer pulled by a tractor driven by his father. The tractor belonged to a Mr Barry Forie. When they went passed Shanaze bus stop three people (PW3, PW4) and one Linda who were in a drunken state, stopped the tractor to ask for a ride, but his father turned them down because there was no space for them.

[32] A1's tractor came under attack from stones thrown by the three persons who were declined a ride, joined by others. The driver stopped the tractor and managed to calm the situation down and resumed the trip. However, the mob followed the tractor up to Mageza's bustop where they intensified the attack with stones, forcing A1 and team to take refuge at a Xaba homestead. It was at this stage that the mob vandalized the tractor. A1's evidence under cross examination was that he saw the deceased among the mob. He

acknowledged that the evidence of crown witnesses² was not disputed by cross examination, to the effect that deceased's appearance at Magheza was to calm the mob down, and that he left for his home after his intervention failed. A1's father phoned the police but was told that there was no transport to attend the scene. A1 and his brothers left Xaba's home after they heard the mob chanting that they were going to carry out an attack on A1's home.

[33] At home A1, 2 and 3 attended to the barking dogs when they were confronted with a salvo of stones in the course of which A2 was hit with a stone. The Accused persons, armed with a stick and a knife,³ confronted the assailants and caused them to flee. A1 claimed that they pursued one of the assailants to his house in the neighbourhood, and this turned out to be the deceased. This happened around 21:00 – 22:00 hours. They knocked repeatedly on deceased's door, inviting him to come out to talk.

[34] In response, the deceased issued a threat that he was going to kill one of them when he came out. A1 and A3 left the precincts while A2 remained behind. After exiting deceased's gate, they heard A2 shouting that deceased had injured him. They went back and met A2 outside the gate where he told them that the deceased assaulted him with an axe on the head, and that he in return stabbed the deceased.

[35] The three Accused went home, dressed A1's injury. They called the police, and were again told there was no transport. The following morning which was a Monday, A1 accompanied A2 to hospital at Nhlangano where he was treated and discharged. From there A1 went to his work place.

² Evidence of PW3 and PW4.

³ A1 said he was armed with a stick and A2 with a knife.

[36] On Tuesday morning A1 went home after receiving a message that he was sought by police. He met with police at Magheza bus stop and narrated to them the events of the previous night. A1 went home with the police where he pointed out A2's knife on the latter's bed. A1 was thereafter arrested and detained at Hluthi.

[37] A3 testified that he was a subsistence farmer at Magheza, the place where he lived in February 2015 when the incident happened. He confirmed DW1's evidence: the tractor trip to fetch river sand and the episodes of attack by the mob which included PW3 and PW4; taking cover at Xaba's; the malicious damage to their tractor; and the mob's announcement that they were going to attack and destroy Accused person's homestead.

[38] After the Accused got home the mob threw stones, one of which hit A2. Explaining how they ended up at deceased's house A3 also said that they managed to repel the attackers, that they followed and pursued one of them right to his house. The person turned out to be the deceased. DW2 reiterated DW1's assertions that they merely knocked at the door and invited deceased for a talk, but he threatened them with death. This was at about 21:00 or 22:00 hours. The two Accused left while A2 remained.

[39] A1 and A3 came back in response to A2's cry, and met him at deceased's gate, where he told them that deceased injured him with an axe on the head, and that he stabbed the deceased in return.

[40] A2 and DW2 were subsequently arrested and detained at Hluthi police station where they were interrogated. They were joined by A1 the following day.

Analysis and findings

- [41] It is common cause that a tractor-pulled trailer on which the Accused persons were riding came under attack by a clique from a drinking spot. It is clear from both the crown and defence evidence that the source of trouble was that three drinking buddies of the mob were refused a ride on Accused persons' tractor trailer. For that, the Accused, their father and those who were with them were violently forced to abort their mission of the day to transport river sand, for no apparent justifiable reason.
- [42] Evidence presented by the crown proves that the deceased died as a result of a stab wound to his abdomen. This is shown by the evidence of PW5, the surgeon at Hlatikulu hospital who treated and operated on the deceased. The deceased was brought to Hlatikulu hospital on the 16th February 2015 on referral from Matsanjeni Health Centre, with history of a penetrating injury caused by a sharp object on the right flank, reported to have been sustained on the night of the 15th February 2015.
- [43] Upon arrival PW5 noted among others, a 3cm long and deep wound on the flank region. PW5 carried out an immediate procedure on the patient namely, right hemicolectomy with end to side anastomosis and cholecystectomy. Despite efforts made the patient died on the 18th February 2015.
- [44] The cause of death was stated by the pathologist who conducted a post-mortem examination, as complications from abdominal injuries. PW1 Dr Reddy's evidence correlates with that of PW5 by reference to one fatal injury located on the abdomen. PW1 noted the other three sutured wounds which he opined were made by the surgeon in order to treat internal injuries.

Indeed, PW5 recorded in evidence that on arrival the deceased had one 3cm long and deep wound on the right flank. PW5 also noted internal injuries, including perforated vertical and lateral colons.

[44] From the medical evidence presented by PW1 and PW5 it is clear that the cause of death of the deceased was the injury inflicted on his abdomen with a sharp object, on the 15th February 2015.

[45] It is common cause that the two accused A1 and A3 together with the late Mphumelelo Ndwandwe who was A2, paid a hostile visit to the deceased on the night he was stabbed. There is admission from the defence that one of the Accused persons inflicted a stab wound on the deceased. During cross examination of PW2, it was put to this witness that A1 stabbed the deceased in defence of A2 after the deceased had attacked A2. However, this line of defence changed when A1 took to the witness box. A1 stated that it was A2 who stabbed the deceased in self-defence.

[46] The court finds PW2 Sihle Mhlanga to be a credible and truthful witness. She did not appear to stretch or to conceal the facts in any way. She gave her evidence in a clear, straight forward manner. Both in chief and under cross examination, she readily admitted what she did not see or the facts she had no knowledge of. The court accepts her version of events as captured in preceding paragraphs of this judgment. However, her estimation of the object that A1 carried as a spear cannot be reliable. In her own words she said it looked like a spear. Given that it was at night with no source of light the court accepts A1's version that he carried a rod and not a spear. The rest of PW2's evidence is accepted in preference to that of the Accused persons. The court accepts in particular that when the deceased exited the house the

three Accused awaited him outside; that the deceased fled and the Accused chased after him.

[47] The court accepts as proved that the Accused persons attempted to mislead the deceased that they were police when they knocked at his door on the fateful night, and that the Accused forcibly broke the door lock. PW7, the investigating officer's evidence corroborated PW2's evidence on this point. PW7 testified in chief and under cross examination that when inspecting the scene, he observed that deceased's door lock was damaged.

[48] The court rejects A1 and A3's evidence that they merely wanted the deceased to come out to talk. They clearly came to fight him as evidenced by their actions. They first disguised their identities and said they were the police, and then forcibly opened his door, after which they chased after him. The court accepts as true the evidence of PW2 that the Accused warned her to stay indoors and told her that she did not have to witness what was going to happen. That statement indicated the mood of the Accused and the violence they were about to unleash on PW2's partner.

[49] A1 and A3's evidence that they left the late Mphumelelo behind at deceased's place and that they only returned when he called for help cannot be correct. The credible evidence of PW2 is that when the deceased exited the door he fled towards the left side of the house where A2 waylaid him. When the three Accused gave chase, it follows that A2 was the one closest to the fleeing deceased, hence it is plausible that the deceased may have inflicted the head injury on A2. This is confirmed by PW2 who also testified that she heard A2 saying that the deceased had hit or beaten him.

[50] PW2 said she had no idea whether the deceased carried anything because he followed after her out of the house. According to the Accused persons the deceased injured A2 with an axe. However, no axe was referred to by any of the crown witnesses. PW7, the investigating officer, was cross examined on the axe alleged to have been found next to the deceased, but he denied finding any axe, or being shown one. Be that as it may the court accepts that the deceased in his flight and subsequent fight with his attackers may have inflicted an injury on A2 with an object unknown to the court. PW7 confirmed under cross examination that upon arrest A2 had a bandage on his head. The court finds it concerning that there is no evidence of any further inquiry by the police concerning A2's injury.

[51] It is strange that the Accused claim that the deceased was stabbed by one of them in self-defence. The defence of self-defence cannot avail the Accused in circumstances where they were the aggressors. Accused 1, 2, and 3 went to deceased's home armed with a stick and a knife for the purpose of assaulting him, which mission they carried out. If anyone acted in self-defence, it was the deceased who was chased by the Accused baying for his blood, not vice versa.

[52] The defence gave conflicting versions as to who between the late Mphumelelo and A1 stabbed the deceased. While cross examining PW2, defence counsel put it to this witness that A1 stabbed the deceased in defence of A2. This is how the cross examination of PW2 went:

"DC: My instructions are that after deceased's assault of Accused 2, Accused 2 ran out of the homestead and passed Accused 1 and Accused 3 on their way from the homestead, chased after by the deceased.

PW2: That is not true. It was the Accused persons who followed after the deceased and fought him in the field.

DC: My instructions are that the deceased further assaulted Accused 2 after he fell while running away from him.

PW2: I cannot agree that deceased chased after Accused 2 because we found the deceased lying down in pain.

DC: My instructions are that Accused 1 then stabbed the deceased to assist Accused 2 who was being assaulted by the deceased.

[Emphasis added].

[52.1] What was put to the crown witness as a defence here was that A1 stabbed the deceased in defence of A2. However, as alluded to earlier, a different version was put forward later in the defence case.

[53] It was put to PW7, Detective Sergeant Sibiya under cross examination that A2 stabbed the deceased in self-defence. This was stated in the light of PW7's evidence that A1 led police to a house at his home where he retrieved a knife⁴ and handed it to the police. Further still, A1 testified in his defence that the late Mphumelelo told him that he stabbed the deceased after the latter injured him on the head.

[54] Be that as it may, it is immaterial whether it was A1 or A2 who stabbed the deceased. The court finds that the trio of A1, Mphumelelo and A3 acted in

⁴ Exhibit "1".

furtherance of a common purpose in their attack of the deceased. There is an admission that one of the Accused stabbed the deceased. The three were on a joint venture to cause harm to the deceased and this they accomplished when one of them inflicted the injury on his belly with exhibit "1" which injury led to his death.

[55] PW2's evidence which the court accepts as credible over that of A1 and A3 leaves no doubt that the Accused persons came to deceased's residence for the sole purpose of attacking him. The Accused believed that the deceased was one of those who attacked them with stones. This is indicated in the cross examination of PW3 and PW4, as well as the evidence of the two Accused. Despite the evidence that the deceased never participated in the attacks that were staged against the Accused and those aboard the tractor-trailer, it is apparent that the Accused held him liable, by his mere presence at the scene of the attacks, and the fact that the unruly mob were his drinking mates.

[56] Both Accused persons' claim that they followed the deceased to his home directly from their home where stones were thrown, cannot be correct in the face of the crown evidence that the deceased left the mob much earlier at Magheza bus stop.⁵ The Accused's assertion on this point is further discredited by PW2's evidence that at the time that the Accused showed up at deceased's doorstep, the latter had long been to his house. He had finished taking a bath and was relaxing with PW2 and their baby when they were rudely interrupted by Accused's knock. The evidence of PW3 also negates Accused persons' version that they followed the deceased to his house immediately after throwing stones at their home. PW3 testified that while

⁵ See PW3 and PW4's evidence.

sleeping that fateful night, A1 and others appeared at his house, shone a torch on his face and slapped him. That, a while thereafter PW2 came to report that the deceased was being attacked at their home. Although this piece of evidence is disputed by the Accused, it ties well with how the events leading to the stabbing of deceased unfolded, as opposed to the improbable version that the Accused want this court to believe.

[57] The essence of the doctrine of common purpose is aptly stated by the court in **Ngcamphalala & Others v Rex**⁶: “*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...*” In **S v Sefatsa**,⁷ the leading case on the doctrine of common purpose, referred to with approval by the Supreme Court in **Ngcamphalala’s** case,⁸ the Appellate division found that all six appellants had a common purpose to kill the deceased. The court found that it was sufficient that the individual participants actively associated themselves with the execution of the common purpose and the conduct of those that caused the death were imputed onto the appellants.

[58] Common purpose is further described thus: “*where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise each will be responsible for the specific criminal conduct committed by one as their action falls within the common design.*”⁹

[59] Based on the principle of common purpose both Accused 1 and Accused 3 are held liable for the death of the deceased. On their own admission the

⁶ Appeal Case No. 17/2002.

⁷ 1988 AD

⁸ Supra.

⁹ Jonathan Burchel and John Milton, Principles of Criminal law at page 574

three Accused set out from their home to deceased's house and knocked at his door. Two of them were armed one with a stick and the other with a deadly knife as, weapons for their mission. The Accused were angry from their belief that the deceased took part in the attacks against them earlier in the evening.

[60] The state bears the onus of negating beyond reasonable doubt the justification ground of private defence and of establishing beyond reasonable doubt the accused's knowledge that his act was not justified on grounds of private defence. See **Johannes Kruger v The State**.¹⁰ Following that the court rejects the claim that A2 acted in self-defence or that A1 acted in defence of A2, there was no legal justification for the attack on the deceased. Even if the Accused were correct that the deceased took part in the unlawful senseless attacks that were inflicted against the Accused and their property¹¹ earlier on, it would still be unlawful for the Accused to take the law into their own hands and to subsequently punish the deceased in revenge as they did. Perpetrators of aggression must be reported to law enforcement and the law must take its course against the individuals involved.

[61] The killing of the deceased was therefore unlawful. Having found that there was no justification for the killing, the court must also consider the element of *mens rea*. The necessary inquiry is whether the crown has proved beyond a reasonable doubt that the Accused had the factual intent to kill the deceased. It is not necessary for the crown to prove direct intention on the part of the Accused, for factual intent to kill also encompasses a state of mind in which the accused foresees that the death of another may result and

¹⁰ ZAHC Case No. A347/2013.

¹¹ Tractor that was vandalized by the mob.

is reckless as to whether or not death ensues.¹² The use of a lethal weapon such as the sharp object or knife on a vulnerable part of the body of the deceased is relevant in determining the necessary intention to kill. The Accused must have foreseen that stabbing the deceased in the belly with a knife might result in his death but nonetheless proceeded, reckless of whether or not death would result. After stabbing the deceased the Accused left him lying down, did not render assistance, nor did they seek any assistance for him. Thus, the Accused's conduct demonstrated the necessary *mens rea* to kill the deceased in the form of *dolus eventualis*. See **Rex v Mduduzi Zwane**.¹³

[62] In the circumstances the crown has proved the guilt of the Accused for murder beyond a reasonable doubt. Both A1 and A3 are found guilty of murder as charged.

Extenuating Circumstances

[63] Section 295 of the Criminal Procedure and Evidence Act enjoins a court which has convicted an accused person of murder to state whether in its opinion there are any extenuating circumstances. In this regard, the court inquires, firstly, whether there were at the time of the commission of the crime facts or circumstances which could have influenced the accused's state of mind or mental faculties and could serve to constitute extenuation. In the second place, whether such facts or circumstances, in their cumulative

¹² Kruger v the State *supra*.

¹³ Criminal Case No. 68/09.

effect, probably did influence the accused's state of mind in doing what he did. Lastly, whether this influence was of such a nature as to reduce the moral blameworthiness of the accused in doing what he did. In deciding the last issue, the trial court exercises a moral judgment. See **Sibusiso Kukuza Dlamini v the King**.¹⁴

[64] The evidence before court is that earlier in the day prior to the Accused's late night visit to the deceased, the Accused were victims of mob attack by a group of hooligans, who were drinking with the deceased. A1 did not see the deceased during the first attack at Shamaze, but he saw him amid the mob during the second episode of attack at Magheza bus stop. A3 said he saw the deceased on both occasions. Both Accused believed that the deceased was part and parcel of mayhem where they were attacked for no apparent reasons. My criticism of the Accused for taking the law into their own hands, as well as the finding I pronounced in terms of the evidence led by the crown, that the deceased did not take part in the attacks, do not detract from the fact that the Accused persons believed that the deceased was part and parcel of the attacks against them. Clearly the Accused were not aware of deceased's role and attempts to calm the situation down. Hence, they held him responsible, albeit based on a mistaken belief.

[65] Pertinent questions for the court are: does the suffering of the Accused at the hands of the mob on that day constitute a relevant factor to serve as extenuation, and if so, did such facts or circumstances, in their cumulative effect, probably influence the accused persons' state of mind in doing what he did? And lastly, the

¹⁴ (18/2019) [2021] SZSC (3rd June 2021).

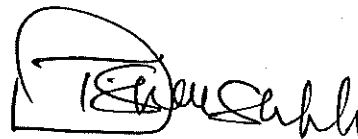
court must consider whether this influence was of such a nature as to reduce the moral blameworthiness of the accused in doing what they did.

[66] There is no doubt in my view that the answer to these questions is in the affirmative. Based on that I reach a conclusion that extenuating circumstances exist.

[67] I therefore return the following verdict:

[67.1] Accused No. 1: guilty of murder with extenuating circumstances

[67.2] Accused No. 3: Guilty of murder with extenuating circumstances



D Tshabalala
Judge

For the Crown: Mr S Mdluli – (DPP's Chambers)

For Defence: B Dlamini – (B C Dlamini Attorneys)