



IN THE HIGH COURT OF ESWATINI
JUDGMENT

HELD AT MBABANE

CASE NO: 476/19

In the matter between:

THE KING

Versus

- 1. SABELO MLUNGU MNISI**
- 2. NKOSINATHI LUKHELE**
- 3. DOUGLAS MNISI**
- 4. MFANASIBILI MAGONGO**
- 5. THEMBISA DLAMINI**
- 6. SANDILE MSIBI**
- 7. NDZABATELIVE MNISI**
- 8. SANDILE MAGONGO**
- 9. NKOSIKHONA MASILELA**
- 10. NHLANHLA MNISI**
- 11. BHEKISISA MNISI**
- 12. ZAKHELE MASANGO**
- 13. NKHULULEKO MNISI**

Neutral Citation: *The King vs Sabelo Mlungu Mnisi and 12 Others [476/19] [2022] SZHC 270 (30 November 2022)*

Coram: LANGWENYA J

Heard: 30 March 2022; 6 April 2022; 26 April 2022; 26 September 2022; 21 November 2022;

Delivered: 30 November 2022.

Summary: *Criminal law-Criminal Procedure-The accused persons were charged with murder with a common purpose-They pleaded not guilty to the charge-At the time they pleaded, they were represented by Mr M Dlamini-During the course of the trial, the accused were subsequently represented by Ms N Ndlangamandla who informed the Court that the accused were now pleading guilty to culpable homicide-The Crown did not accept the plea of guilty to culpable homicide tendered by the accused during the continuation of the trial.*

The accused were found to have acted with a common purpose in committing the crime of culpable homicide.

JUDGMENT

Introduction

- [1] The accused persons were charged with the offence of murder. It being alleged by the Crown that on or about 30 October 2017 and at or near Ntsanjeni in the Hhohho district, the accused persons, each and all of them acting jointly in furtherance of a common purpose did wrongfully, unlawfully and intentionally kill Sincomiso Ernest Dlamini by assaulting him all over body and therefore committed the offence of murder.
- [2] When the charge was put to the accused persons, they all pleaded not guilty. At the time, the accused were represented by Mr Machawe Dlamini. During the continuation of the trial until its conclusion, the accused were represented by Ms Ndlangamandla. Ms Ndlangamandla informed the Court that the accused persons were now pleading guilty to culpable homicide. The Crown did not accept the plea of guilty to culpable homicide tendered by the defence.
- [3] The Crown called six witnesses in support of its case.
- [4] The defence called the first accused (Sabelo Mlungu Mnisi), the third accused (Douglas Mnisi), the fourth accused (Mfanasibili Magongo) and the ninth accused (Nkosikhona Masilela) as witness.
- [5] The Court heard that the deceased, Mr Sincomiso Ernest Dlamini was from Macetjeni area and had moved to settle albeit without lawful authorization at a government farm at Nyonyane Sisa Ranch where he had erected a shack. The farm is located in a mountainous place. The deceased is alleged to have been engaged in the unlawful business of dagga farming. The deceased had romantic liaison with PW1 Nonhlanhla Doris Msibi. The accused considered

the deceased to be a dangerous person as he is alleged to have assaulted some members of the community at Ntsanjeni and is also alleged to have engaged in other criminal activity including robbery. On 30 October 2017, the accused persons arrested the deceased person and later handed him over to the police. This is a brief background to this matter.

The Crown's Case

- [6] Nonhlanhla Doris Msibi was called as PW1. She is a romantic partner of the deceased. On the night of 30 October 2017 and at about 11pm, she was with the deceased in their shack when she heard footsteps and noise outside. No sooner had she heard voices ordering that the shack should be encircled than she heard the shack being vandalized and ripped open. At the time, the deceased only had a T-shirt on and was armed with a bush-knife.
- [7] Ms Msibi heard a voice saying Mr Sincomiso Dlamini should be caught before he fled the scene. Mr Sincomiso was assaulted with kicks and fists and thrown to the ground and his hands were tied with a rope at his back. It was after Mr Sincomiso Dlamini had been restrained and was seated on the ground that the accused persons continued to assault him with sticks. Zakhele Masango set the shack alight.
- [8] The accused persons left the mountain with the deceased person. Ms Msibi was ordered to come with the deceased person's personal effects. Ms Msibi followed the accused who were travelling with the deceased from a distance. During the walk downhill, the deceased was continuously assaulted by the accused persons with sticks. Each time the sticks they used got depleted, the accused persons would replace the sticks and continue to assault the deceased person.

- [9] When the accused got to Nyetane, they found Mr Lukhele's motor vehicle. They again assaulted the deceased and ordered him to run as the motor vehicle was leaving the place. Ms Msibi listed all the accused persons as the deceased person's assailants during that fateful night. She testified that the accused persons subsequently ordered her to go to her parental home. At the time the accused persons went with the deceased to a bus station known as Number 13. When Ms Msibi got home, she called and reported the matter to the police.
- [10] As the night wore on, Ms Msibi was summoned by some of the accused and directed to bring deceased's clothes. She obliged. When she tried to help deceased put on his clothes, she was stopped from helping the deceased wear his clothes by the third accused- Douglas Mnisi. Douglas Mnisi told Doris that the deceased was not her husband so she could not help him put on his clothes. At the time the deceased's feet were tied and his hands were not tied. At the Bus stop, deceased was bleeding profusely and was weak; his T-shirt was soaked in blood. Ms Msibi testified that at the Bus stop all the accused persons were present.
- [11] It was put to Ms Msibi that the deceased was never assaulted by the accused; that he sustained the injuries along the way as he tried to escape from the accused. Ms Msibi stated that the deceased was assaulted by the accused persons with sticks that were plus minus two centimetres in width. Ms Msibi testified that the deceased never fell along the way. She told the court that as she followed the group that was going with the deceased, she heard the deceased raise an alarm each time he was assaulted.
- [12] Sifiso Celumusa Masilela was called as PW2. He was introduced as an accomplice witness. The witness was warned in terms of section 234 of the

Criminal Procedure and Evidence Act¹. On 30 October 2017 during the day he was at Phumelele grocery playing cards with the third accused persons (Douglas Mnisi) when the latter informed him that Ms Msibi was seen carrying groceries and mealie meal going up the mountain. Douglas is said to have surmised that Sincomiso was probably back at his shack on the mountain. The first accused also confirmed the version as told by Douglas and stated that he had also been informed by the fourth accused (Mfanasibili Magongo) that Sincomiso must be back at his shack since Doris was seen climbing the mountain carrying food.

[13] It was agreed that the deceased would be arrested during the nighttime because most of the people who could help with the arrest were not available during the day. They got a report that the deceased had assaulted Mphumelelo Dlamini and the matter was reported to Mr Mbhamali at Mandlangemphisi. Mphumelelo informed the accused that Mr Mbhamali had advised that they should look for the deceased, arrest him and hand him over to the police. Mr Mbhamali had warned the accused against assaulting the deceased.

[14] At around 9pm the accused persons went to the mountain. PW2 was with Mlungu Mnisi (first accused), Ndzabatelive Mnisi (seventh accused) Nhlanhla Mnisi (tenth accused), Sandile Msibi (sixth accused), Nkosinathi Lukhele (second accused), Thembisa Dlamini (fifth accused), Nkosikhona Masilela (ninth accused), Douglas Mnisi (third accused), Nkhululeko Mnisi (thirteenth accused), Bhekisisa Mnisi (eleventh accused), Sandile Magongo (eighth accused) and Zakhele Masango (twelfth accused).

¹ No. 67/1938.

- [15] When the accused arrived at the mountain and at the scene, they encircled deceased's shack. Some of the cellphone lights were on. Mfanasibili ordered the deceased to get out of his shack. Deceased's shack was ripped apart by the accused persons. Deceased armed himself with a bush-knife. Nkhosikhona Masilela hit the deceased with a stick and the bush-knife that the deceased was carrying fell to the ground. When the accused tried to arrest the deceased, he resisted arrest and a scuffle ensued; Mfanasibili Magongo assaulted the deceased with a bush-knife. The deceased was overpowered and dragged outside the shack.
- [16] During cross examination, PW2 testified that if Mfanasibili did not intend to assault the deceased with a bush-knife during the scuffle leading to his arrest, then there must have been confusion when Mfanasibili hacked the deceased with a bush-knife during his arrest.
- [17] Inside the shack, deceased was with PW1. PW1 raised an alarm because she was shocked. The deceased was tied with a rope. PW2 assisted Doris who complained that she could not find his phone. The phone was taken by accused 11 (Bhekisisa Mnisi) who conducted a search inside the shack. Bhekisisa returned the phone to Doris.
- [18] When the deceased was arrested, he resisted to being tied. PW2 admonished the accused not to assault him heavily because they still had a long way to go.
- [19] PW2 traveled down the mountain with Doris and other people while the group that was with the deceased went ahead of them. The distance between the two groups was more than two hundred metres. Along the way, PW2 boarded Nkosinathi Lukhele's motor vehicle and caught up with the group

that was walking with the deceased at Nyetane bridge. Lukhele's motor vehicle drove until it reached the 13 Bus stop where they sat and waited for the rest of the accused persons.

[20] When the accused arrived with the deceased, he was weak and PW2 suspected that he had been heavily assaulted. Mphumelelo Dlamini, Mahhunga Mnisi, Musa Mnisi also arrived at the bus stop. PW2 made a fire for everyone to keep as it was cold at night time. PW2 subsequently slept in Mr Lukhele's motor vehicle.

[21] PW2 had woken up when the police arrived. He saw the deceased run to the police vehicle, hit his head against the police vehicle and fell face-up to the ground. The deceased ran like someone who wanted to get help from the police as he was weak. The police spoke to the first accused; took the deceased and left with him alive. The police arrived between 2am-3am.

[22] At bus stop 13, a most of the accused persons were carrying sticks.

[23] When PW2 was quizzed about deceased being a danger, he stated that he is unsure if deceased was dangerous. PW2 said he had heard that Sincomiso had a fight with Mphumelelo but that could be because they had personal issues between themselves. It was PW2's evidence that on a previous occasion, he was present when Sincomiso accosted Mfanasibili. He did not see the deceased pull out a knife during the confrontation he had with Mfanasibili.

[24] During cross examination, it was suggested to PW2 that the route that the accused persons used from the mountain was affected by soil erosion and was thorny and rocky; he stated that the route may have fallen into a state of disrepair but it was not thorny. PW2 testified that the route was good enough

to be used by people as it had trees on the side of the road. PW2 estimated the distance from the shack to the Bus stop 13 to be about seventeen kilometres.

- [25] PW2 testified that the intention of the accused was not to kill the deceased but to arrest him so he could be brought before the law to answer for his crimes. The accused persons reported the matter to the community elders and were subsequently taken to Mliba police station. They also asked people to attend the funeral of the deceased and pass their condolences.
- [26] PW3 is 4554 Detective Constable Mandla Cindzi. On 30 October 2017, during the night he received a report that a person had been assaulted at Ntsanjeni. He travelled to Ntsanjeni with 6925 Constable Mduduzi Bhembe. On arrival at bus stop number 13, the police found a group of people. A person from the group came running to the police van and tried to hold on to the police vehicle but failed to do so because he was weak. The person lost strength, hit a corner of the police vehicle and fell to the ground. The police learnt that the person was Sincomiso Dlamini. Sincomiso was injured and his black T-shirt was soaked in blood. Sincomiso was taken to Dvokolwako Health Centre in critical condition as he had injuries all over his body. Sincomiso had been assaulted. PW3 insisted that the deceased did not run from the police in as much as he ran to them as one who sought assistance and refuge as he had been assaulted. Sincomiso was fleeing from the people he was with to the police.
- [27] When the police took Sincomiso with them he was fully dressed. It was when they got to the Health Centre, that PW3 inspected the body of Sincomiso and found that he had bruises on the upper part of the body and at his back.

- [28] It was suggested to PW3 that deceased's T-shirt was wet not because he was injured but because he was sweating after he travelled a long distance from the mountain. PW3's response was that blood coming out of the deceased was red and Sincomiso was bloodied at the time he inspected him.
- [29] PW4 is 4865 Constable Jerome Mhlonishwa Dlamini and an investigating officer of this matter. On 31 October 2017 he received a report that the deceased had been transferred from Dvokolwako Health Centre to Mbabane Government hospital. He arrived at around 1pm at Mbabane Government hospital on 31 October 2017 and found that the deceased had died but his body was still in the ward. He was informed by medical personnel that the deceased had died in the morning when he arrived from Dvokolwako Health Centre. He observed that the deceased had bruises on his body; he also had a cut on the forehead as if a sharp object had been used to assault him. He recorded statements from witnesses. His investigations led him to the accused persons.
- [30] The accused were later brought to the police station at Mliba by their lawyer Mr Machawe Dlamini. It was after he had introduced himself to the accused as a police officer and explained his mission to them that the accused persons asked for time to instruct their lawyer. He allowed the accused to consult with their lawyer. When the accused returned to the police they were cautioned in terms of the Judges' rules. Mfanasibili Magongo showed the police a bush-knife which had a black handle. Nkhosikhona Masilela on the other hand produced a baton which was a metre long and plus-minus five centimetres thick. PW4 handed into Court the bush-knife and the baton. The bush-knife and baton were marked exhibit 'A' and 'B' respectively.

- [31] PW4 testified that Mphumelelo Dlamini made a report at Mliba police station that he had been assaulted with a bush-knife by the deceased; he stated that Mphumelelo wanted the deceased to be brought before the law. PW4 testified that the police were, however not aware that the deceased was a dangerous person.
- [32] PW5 is the scenes of crime officer-6248 Detective Constable Reason Manana. He found deceased's body in the mortuary. He observed the injuries on deceased's body and took photographs and compiled an album of the photographs he took. The album was handed in as an exhibit and was marked as exhibit '1.'
- [33] Dr R.M. Reddy, a police pathologist conducted a post-mortem examination of the body of the deceased on 2 November 2017. He prepared a post-mortem report which was handed to court and marked exhibit '2.' At the time of the hearing of the matter Dr Reddy was unavailable as he was said to be out of the country for an extended period of time. PW6-Dr Swapnika Enugala, a police pathologist was called to explain the contents of the post-mortem report prepared by Dr Reddy. This was done in terms of section 221 of the Criminal Procedure and Evidence Act² which states as follows:

'Reports by medical and veterinary practitioners

221 (1) In any criminal proceedings in which any facts are ascertained-

- (a) By a medical practitioner in respect of any injury to, or state of mind or condition of the body of, a person, including the results of any forensic test or his opinion as to the cause of death of such person; or**
- (b) ...**

Such facts may be proved to a written report signed and dated by such medical or veterinary practitioner, as the case may be, and that report shall be *prima facie* evidence of the matters stated therein:

² 67/1938.

Provided that the court may of its own motion or on the application of the prosecution or the accused require the attendance of the person who signed such report but such court shall not require if-

- (i) The whereabouts of the person are unknown; or**
- (ii) Such person is outside eSwatini and, having regard to all the circumstances, the justice of the case will not be substantially prejudiced by his non-attendance.**

(2) Where a person who has made a report under subsection (1) has died, or the court in accordance with the proviso to subsection (1) does not order his attendance, such report shall be received by the court as evidence upon its mere production, notwithstanding that such report was made before the coming into operation of the Act.

- [34] The post-mortem report says the deceased died due to multiple injuries. The first injury was said to have been a result of contusion, bleeding into the tissue and was caused by a blunt object. The first injury is a sutured wound behind the left ear, 3cm long with a 4cm abrasion on reflection scalp there is a contusion on the left temporal region, occipital region measuring 4.1cm, 6cm area present with subdural haemorrhagic clot about 70ml.
- [35] The second injury was caused by a blunt object resulting in blood being infused into the subcutaneous tissues as blunt force was used. The second injury consisted of a contused abrasion over the face covering a 14.7cm area with small laceration of the inner aspect of the lower lip measuring 1cm x 0.4cm lip deep. There was also an effusion of blood in the soft tissues. It was the doctor's evidence that when the deceased was treated, he was given intravenous fluids which fluids lodged in his lungs as his kidneys were not functioning properly as a result of his injuries.
- [36] The third injury consisted of a contused abrasion on the front middle part of the neck measuring 5cms x 0.4cm present. The fourth injury consisted in contused abrasions over the right upper limb, left upper limb measuring 21cm x 6cm, 23 x 5.7cm area by 0.2cm to 5.7cm length by 0.3cm to 0.5cm.

The third injury also reflected that there was effusion of blood into the soft tissues.

[37] The fifth injury was a contusion over the front of the abdomen measuring 19cm with effusion of blood into the abdominal wall. The sixth injury, on the other hand consisted of a contused area with abrasions measuring 18.2cm are on the left shoulder stretching to the back.

[38] The seventh injuries were made up of contused abrasions measuring 0.5cm to 11cm x 0.5cm to 4cm which were intermingled over the trunk, buttock, thigh and legs. The injuries measured 90cm x 2cm to 26cm area and there was effusion of blood in soft tissues.

[39] It was the doctor's evidence that the second to the seventh injuries were regarded as massive injuries because they affected a big portion of the body which was covered in contusions. It was PW6's evidence that the second up to the seventh injuries were the cause of death. The deceased suffered internal bleeding into his tissues.

[40] The injuries detailed in the post-mortem report were consistent with the injuries reflected in exhibit 1 being the album of photographs of deceased's body taken while he was in the mortuary.

[41] The Crown closed its case.

Defence case

DW1-Sabelo Mlungu Mnisi

[42] The first witness for the defence was DW1 Sabelo Mlungu Mnisi. He testified that he is the head of the community police in his home area of Ntsanjeni in the Hhohho district. He testified that the deceased was known to

be a dangerous man in the area as he was alleged to have committed offences ranging from assault to robbery in shops around the area.

- [43] On 30 October 2017 he received a report that the deceased was back at his shack on the mountain as her romantic partner Ms Doris Msibi was seen by members of the community going up the mountain carrying mealie-meal and groceries. This, he heard from Douglas Mnisi. Mr Sabelo Mnisi called another community police-Thembisa Dlamini and told him to alert other members of the community police to come along in the evening hours of the day to go and arrest Sincomiso Dlamini.
- [44] When the accused got to deceased's shack, DW1 suggested that the shack be encircled because the deceased was a dangerous man. DW1 says he introduced himself and his troops and informed Sincomiso that the accused persons were there to arrest him for the offence of assaulting Mphumelelo. No sooner had he made the introduction than he heard noise coming from inside the shack and noise from outside the shack when people shouted that Sincomiso had come out of the shack.
- [45] DW1 says he opened the door of the shack and heard someone shouting that Sincomiso was hacking something. Someone shouted for help from inside the shack. The shack was ripped apart. Sincomiso fought back and resisted arrest. There was commotion and a scuffle and the only source of light came from cellphones. Sincomiso was subdued and restrained. Sincomiso was half-dressed when he was arrested. The accused could not allow him time to wear pants because he was a violent person. According to DW1 Sincomiso was wearing a T-shirt and a BVD when he was arrested.

- [46] Sifiso Masilela came with a rope which he used to tie Sincomiso's hands at his back. After Sincomiso was tied, DW1 informed the accused persons who were there that Sincomiso was wanted by the police. He directed also that some people should help carry Sincomiso's personal effects because they did not want him returning to their area as he was a dangerous man. Nkosinathi Lukhele, Ndzabatelive Mnisi, Bhekisisa Mnisi, Thembisa Dlamini, Zakhele Magongo and Ms Msibi Doris helped carry Sincomiso's property from the shack downhill.
- [47] DW1 told the court that he subdued Sincomiso when he was being tied with a rope. After Sincomiso's property was removed from the shack, the shack was set alight. The accused persons left the mountain walking in two groups: the group that travelled with Sincomiso walked in front of the group that was carrying Sincomiso's property.
- [48] DW1 was with the group that was carrying Sincomiso's property. While walking from the mountain, DW1 sprained his ankle and boarded Lukhele's motor vehicle which took him to bus stop number 13. Sincomiso's property was loaded in Lukhele's motor vehicle. PW1 did not board Lukhele's motor vehicle.
- [49] DW1 phoned the police who later arrived and took Sincomiso with them. The police took Sincomiso not before he attempted to evade arrest by taking flight from the police. It was as he fled that he fell into a culvert face-down. The accused persons caught Sincomiso and advised him not to flee because the police were here to take him with them. Sincomiso was however not deterred as when the police vehicle reversed preparing to park, he again attempted to flee from the police but hit his face against the police vehicle and fell to the ground facing upwards. DW1 testified that the police ordered

the accused persons to catch Sincomiso as he was fleeing. Notably, this was never put to Mr Cindzi. DW1 says he then gave the police his personal particulars after Sincomiso was handed over to the police.

[50] On the next day, DW1 says he was called by the police and informed that Sincomiso had died. DW1 says all the accused persons were devastated at the sad news of Sincomiso's death. He testified that the intention of the accused was not so much to kill the deceased as it was to arrest him and have him face the law. Community elders were informed of the matter. The accused persons were accompanied by community elders and their lawyers when they presented themselves to the Mliba police station. They asked to send people to deceased's family to pass their condolences but were stopped from doing so by the police who feared that violence might erupt because the deceased's family were still angry about the manner one of their own died in the hands of the accused. Subsequently, the accused sent representatives who surreptitiously attended deceased's funeral to pass condolences on behalf of the accused. The accused could not attend the funeral because, at the time they were in the hands of the police.

[51] DW1 testified that when they effected deceased's arrest he was assaulted with sticks. DW1 testified that they chastised the deceased moderately.

[52] During cross examination, DW1 testified that on the way to the mountain he was leading the accused persons. DW1 denied that the accused persons ripped apart deceased's shack but stated that it was the deceased who ripped apart his shack using his bush-knife. This happened as DW1 was trying to open the door of the shack and while the accused were moving inside the shack to arrest the deceased.

- [53] It was during the scuffle to arrest the deceased that DW1 heard Douglas shouting and saying the deceased was biting him. DW1 says he did not see Sincomiso trying to assault Nkhosikhona with a bush-knife and deceased being disarmed by Nkhosikhona.
- [54] It was the evidence of DW1 that it was while they were trying to arrest the deceased that *watsintseka na sizama ku mtfobisa*-which translates to deceased was slightly injured while we were trying to subdue him. DW1 stated that the deceased was assaulted with sticks because he was aggressive and resisting arrest.
- [55] DW1 denied that he was carrying a weapon when he went to the mountain to arrest the deceased. He also denied seeing any of the accused persons carrying weapons on the fateful night.
- [56] When DW1 was asked how it is that they went to arrest a violent and dangerous suspect without being armed, he responded by saying that when the accused persons set out to arrest a suspect, they use the tactic of encircling the suspect before arresting him. DW1 said they did not require weapons to effect an arrest on a dangerous suspect. It is DW1's evidence that he first saw weapons from the accused when the baton and the bush-knife were handed into court as exhibits.
- [57] DW1 testified that deceased got scratched along the way from the mountain to bus stop number 13 because the route was bushy and thorny. DW1 admitted that he assaulted the deceased using open hands during his arrest.

DW2 Douglas Mazulu Mnisi

- [58] DW2 is Douglas Mazulu Mnisi. His evidence corroborates that of DW1 in material respects regarding how he got to know that the deceased was at his

shack in the mountain and concerning the events preceding Soncomiso's arrest. He told the court that when Mlungu Mnisi introduced himself to the deceased before he was arrested, Mlungu was standing next to DW2, Mfanasibili Magongo and Ngwane Dlamini outside the shack.

[59] When the accused persons prepared to take Sincomiso on, DW2 heard someone scream: 'he is hacking me.' At the time, he and the other accused persons were close to the door of the shack. DW2 says he got inside the shack when it was ripped apart. DW12 says he lurched onto Sincomiso (*watiphosa inyandzana*) and was assisted by Mfanasibili to overpower and subdue Sincomiso. When DW2 held Sincomiso, the latter was fighting and kicking with all his strength trying to free himself from DW2's grip. The deceased bit DW2 on his finger. Sincomiso was assaulted by the accused persons when he tried to resist arrest. The people who assaulted Sincomiso were: DW2, Sifiso Masilela, Mfanasibili Magongo and Ngwane Dlamini. The deceased was assaulted on the lower part of his body. After Sincomiso was arrested and subdued, he was tied with a rope. Sifiso Masilela tied Sincomiso with a rope.

[60] The accused persons who walked downhill with Sincomiso were: DW2, Nkhosikhona Masilela, Msibi Sandile, Sandile Magongo, Mfanasibili Magongo and Nkhosenhle Mnisi. The other accused persons remained behind at the shack and collected the property of Sincomiso.

[61] Along the way to the bus stop number 13, the deceased is said to have been talking freely with the accused persons as he knew most of them. There was an instance Sincomiso tried to flee as he was being questioned by DW2. DW2 says he warned Sincomiso not to flee because the route they were using was rocky and littered with thorns and gullies. DW2 says he informed

Sincomiso that once the accused persons effected an arrest on a suspect he cannot escape (*ngeke aphunyule*) DW2 told the court that Sincomiso further tried to bribe the accused persons by offering to pay them E10, 000 if they allowed him to evade arrest by the police. DW2 testified that the police wanted the deceased in connection with robbery of a bank in Manzini. According to DW2 the deceased's injuries were as a result of him trying to flee by running to the bushes and through thistles. Along the way to the bus stop, Sincomiso was never assaulted-so DW2 testified.

[62] When the accused and Sincomiso arrived at the bus stop, Sincomiso is said to have offered the accused persons E15,000 if they released him before the police arrived. Douglas informed the Court that Sincomiso was injured on the eye. Douglas suspects that Sincomiso might have got injured when he tried to evade arrest and he fell face-down.

[63] When the police arrived to collect Sincomiso, the accused untied him.

[64] When the accused persons went to arrest the deceased on the mountain, DW2 says they were carrying one bush-knife and a baton. Mfanasibili Magongo was carrying the bush-knife. It is DW2's evidence that Doris Msibi was not in good terms with Mfanasibili and she had told Sincomiso about the bad blood that existed between her and Mfanasibili.

[65] DW2 testified that he is sorry that the assault resulted in the death of Sincomiso when all they were doing was to subdue him in order to effect an arrest.

DW3 Mfanasibili Suketulu Magongo

[66] On 30 October 2017 during the day he was at work at Nyonyane Sisa Ranch where he was using a bush-knife to cut wood to construct a kraal. Later in

the evening he joined the other accused persons to arrest the deceased at his shack in the mountain. He was still carrying the bush-knife when he went to arrest the deceased.

[67] It was during the scuffle when they were attempting to arrest the deceased that he says Sincomiso accidentally got cut with the bush-knife DW3 was carrying at the time. DW3 says the deceased got cut on the head. DW3 says he also used a stick to assault the deceased on the thighs and on the buttocks. DW3 is part of a group that went downhill with the deceased. He testified that the deceased was not assaulted on the way to bus stop 13. The deceased suffered injuries from the assault meted on him on the mountain. DW3 testified that before the accused arrived to arrest the deceased, deceased was hale and hearty with no injuries.

[68] It is DW3's evidence that it did not cross his mind that Sincomiso could die from the injuries inflicted on him by the accused persons.

DW4 Nkhosikhona Masilela

[69] DW4 testified that on the night in question he was with other accused persons when they went to arrest the deceased. He was armed with a baton which he used to assault Sincomiso with on the arm after he came out of his shack. Sincomiso came out of the shack carrying a bush-knife and DW4 was frightened and hit deceased's hand which was carrying a bush-knife with the baton. Deceased's bush-knife fell to the ground. DW4 did not use the baton after that. DW4 says he was with Nkosinathi Lukhele, Sandile Magongo and Nkosenhle Mnisi.

[70] On the said night, he carried the baton because as a man he usually carries a stick when he travels around (*akahambi yaba yaba*). He testified that he

carried the baton because it was at night and the route they were using had thick vegetation as it was on the mountain. DW4 testified that he assaulted the deceased with a baton when he was trying to avoid blows from the deceased. DW4 admitted that he was with the group that walked with the deceased to bus stop 13.

[71] During cross examination, DW4 told the court that it is untrue that as they walked with Sincomiso down the mountain, Sincomiso raised an alarm as he was not assaulted along the way. DW4 stated that along the way to the bus stop, the deceased attempted to flee and fell and got injured.

[72] DW4 told the court that Sincomiso promised the accused persons that he would walk quietly with them to 13 so there was no reason to assault him.

[73] The defence closed its case.

Analysis of evidence

[74] In the evaluation of the evidential material, this Court has observed the following principles: that evidence must be weighed in its totality and that probabilities and inferences must be distinguished from conjecture and speculation. I have tried to sift the truth from falsehood. I am alive to the fact that there is no *onus* that rests on the accused persons to prove the truthfulness of any explanation which they give or to convince the Court that they are innocent. Any reasonable doubt regarding their guilt must be afforded the accused persons³.

[75] During the course of the trial, I had the opportunity of observing all the Crown witnesses as well as the accused persons as they gave their evidence

³ *S v Jaffer* 1988 (2) SA 84 (C); *S v Kubheka* 1982 (1) SA 534 (W) at 537F-H.

before Court. I distinctly formed an impression that the Crown witnesses were truthful, honest and reliable as witnesses in this Court. In my view, the Crown witnesses did not embellish their versions to disadvantage the accused persons in this matter. I have no reason to reject or disregard their testimonies. I accept it as representing the truth.

[76] On the contrary, I distinctly formed the impression that the accused persons were selective and evasive with their evidence. They were either choosing to exonerate themselves or to downplay their involvement in the events that led to the death of the deceased. As it is said, the truth does not cease to exist because of an attempt to suppress it, I noted that in some instances the truth came out from the accused persons who testified.

[77] I have no doubt that the accused persons told a falsehood that the deceased was not assaulted along the way to 13; that he fell and got injured along the way. There is evidence that the accused were carrying sticks, a baton and a bush-knife on the night in question. The evidence of the police pathologist is that blunt force was used to assault the deceased. This evidence contradicts the versions of the accused-namely that deceased fell on thorns and thistles as they walked with him from the mountain. The deceased was heard by Doris screaming for help as he walked with the accused persons. I take the view that the deceased was screaming and raising an alarm while walking with the accused persons because he was being assaulted by the accused persons.

[78] DW1 peddled a falsehood when he denied that he was carrying a weapon when they set out to arrest the deceased. He also said he did not see any of the accused persons carrying a weapon. The question is, if according to DW1 none of the accused persons were carrying weapons, how was he

mildly chastised by the accused persons. The reality is that the accused assaulted the deceased with sticks, a baton and a bush knife.

[79] The accused further testified that when the police van arrived to collect the deceased, he attempted to flee from the police and fell and got injured. This evidence was denied by Mr Cindzi the police officer who first responded to the report of an assault at Ntsanjeni. It is inconceivable that a weak, bloodied, battered and bruised Sincomiso would have strength to evade arrest by the police. It is more probable, in my view, that if Sincomiso ever tried to do anything, it would be try and seek refuge to the police and flee from the accused persons-his assailants. What compounds the issue also is the fact that Mr Cindzi was never confronted with the evidence that the deceased ran to the police as someone who was seeking protection from his assailants.

[80] Therefore, where the evidence of the accused persons contradict or is at variance with the evidence of the Crown witnesses, I reject it as false. I, in turn accept the evidence of Crown witnesses as representing the truth.

[81] The post-mortem report reflects the injuries which caused the death of the deceased. It is inconsequential that there is no direct evidence in respect of who inflicted each of the injuries. It is clear that the injuries were inflicted by deceased's attackers. The accused persons admit as much that the deceased was healthy and well and without injuries prior to his arrest by the accused persons. The accused assaulted the deceased with sticks and an assortment of weapons; he suffered injuries from which he died.

[82] The Crown alleges that the accused persons acted in concert and in pursuit of a common purpose when they assaulted the deceased resulting in his

death. I agree that the accused acted in common purpose in assaulting the deceased. I do not agree however that the accused persons had the necessary intention to commit the crime of murder. In my view, the accused acted negligently in assaulting the deceased and inflicting fatal injuries on him. Their plea of guilty to culpable homicide says much. The evidence tendered before court reveals that the accused acted with a common purpose to assault the deceased, and that the conduct of some of them resulted in the death of the deceased. It is important to point out that through the doctrine of common purpose, the causing of the deceased's death is imputed to the other members of the group (the other accused persons) as well but the negligence in respect of the causing of the death is not imputed. In order to be convicted of culpable homicide, each individual accused must have been negligent in respect of the death of the victim. For culpable homicide to prevail there must be both the physical and mental element present.

[83] Common purpose liability, it should be noted includes both perpetrator and non-perpetrator liability. In murder and culpable homicide cases, the perpetrators are those accused who unlawfully and either intentionally or negligently contributed causally to the deceased's death. Non-perpetrators, on the other hand are those accused who did not contribute (or who were not proven to have contributed) causally to the deceased's death but who are in any event criminally liable in terms of the doctrine of common purpose. An example of this principle is found in the *S v Safatsa* case. In the *Safatsa* case, all the accused were non-perpetrators as there was no evidence that any of them caused deceased's death. They were convicted of the crime charged.

[84] The essence of the doctrine of common purpose is that two or more people, having common purpose to commit a crime, act together in order to achieve

that purpose; the conduct of each of them in the execution of that purpose is imputed to the others⁴. The application of the common purpose doctrine has the effect of treating all whom it encompasses as drones. The doctrine of common purpose too forces all persons within its scope to be liable and is not selective of the actual act that the individual in fact did.

[85] Accordingly, I find that the Crown adduced evidence to show that each of the accused persons were negligent in their assault of the deceased. On the evidence adduced, I find that it is proved that all the accused acted in common purpose to commit the crime of culpable homicide.

[86] Accordingly all the accused persons are found guilty of culpable homicide.



M. S. LANGWENYA

JUDGE OF THE HIGH COURT

For the Crown: Mr T. Mamba

For the Defence: Ms N. Ndlangamandla

⁴ CR Synman 'Criminal Law' 6ed 2014 at pages 262-263.