



IN THE HIGH COURT OF ESWATINI

JUDGMENT

CASE NO. 93A/2018

In the matter between:

THE KING

VS

1. MUSA CESHA DLAMINI

2. NKHOSIKHONA NKABINDZE

Neutral Citation: *Rex Vs. MUSA CESHA DLAMINI &
ANOTHER*

SZHC (15th August, 2023)

Coram: D.V. KHUMALO A.J.

Heard: 08th August, 2023

Delivered: 15th August, 2023

- [2] The tragic killing of the deceased was pursuant to a misunderstanding with the accused persons over a woman who apparently had a baby with the deceased. It all began when the deceased came to pw2 – Pholile Mngometulu whose daughter had a baby with the deceased. This witness was renting a house in the same compound where the accused persons also stayed. The deceased allegedly enquired about whereabouts of the witness's daughter who apparently was not available. The witness told the deceased that her daughter had relocated to an unknown place. The deceased is said to have left, alleging that he would go via A1 and A2's houses to look for her woman as he would usually hear her talking in those houses.
- [3] The witness was later approached by A2 who allegedly asked if the witness was the one who had referred the deceased to their houses. The witness distanced herself from the alleged visit by the deceased. A2 is alleged to have threatened to deal with the deceased in the manner that would cause the witness to shed tears.
- [4] The witness proceeded to rest in her bedroom as it was at night. While asleep, she was approached by the police who informed her that the deceased had been killed. They further took her to the spot where she found the deceased's body lying dead. The police took the body away.

- [4] Another witness was Sihle Khumalo who testified as pw3. He is a resident of Ludzeludze area and a cousin to A2. His evidence was that he was called by A2 through the phone during the night of the 15th December, 2017 alleging to be under attack. While the witness was on his way to A2's house, the latter called him and when proceeding to the spot where A2 was shouting, he found the deceased on the ground with A1 upon him.
- [5] The witness allegedly could not notice what A1 was doing upon the deceased as it was dark. According to him, A2 was standing next to the two who were on the ground. When drawing nearer, A1 stood up and the deceased also rose and left. The witness asked the accused persons as to why they were letting the deceased off the hook. A1 allegedly told him not to bother as the deceased had already been stabbed. The deceased walked towards the road and later stopped a mini-bus that was in transit. He reported to the driver that he was being killed.
- [6] A1 and A2 allegedly ran away as the deceased talked to the driver. Pw3 proceeded to the mini-bus and realized that the deceased was heavily bleeding. The deceased is alleged to have later collapsed and fell down. The kombi driver and other people tried to pursue the accused persons but could not find them even in their houses. According to this witness, A1 had

been carrying a knife while A2 had been carrying a bush-knife. The deceased's body was later taken away by the police.

- [7] Pw4 was Melusi Dlamini and is the mini-bus driver referred to by pw3. He confirmed the evidence of pw3 that his vehicle was stopped by the deceased who reported that certain people were killing him. He also confirmed that the deceased was bleeding heavily and he died even before the police came. Pw5 is one of the people who were attracted by the deceased's alarm on the fateful night. Upon reaching the scene, he witnessed the condition of the deceased who later collapsed and died.
- [8] Police officers who attended to the deceased's body at the scene were Assistant Inspector Dlamini and Constable Prudence Dlamini who testified as pw6 and pw7 respectively. They examined the deceased's body and took it to hospital where it was certified dead by a doctor. Pw7 also photographed the body and kept the photos as evidence. It was established that one of the suspects was A2.
- [9] Other police officers who investigated the case were Constable Israel Mamba and Constable Maziya - both from Matsapha Police Station. Constable Mamba who testified as pw11 told the court that he proceeded to A2's home where he could not find

him. He then left a message to his mother requesting her to bring A2 to the Police Station as soon as he returned home.

[10] Indeed on the 18th December, 2017, A1 and A2 were handed over to this witness by A2's mother. A2 had been carrying a bush-knife while A1 was carrying a knife. They handed over both weapons to the police. A1 and A2 led the police to a certain house at a Dlamini homestead where they handed over clothes to the witness. They were also taken to Judicial Officers for recording of statements. This was after they had been accordingly cautioned in terms of the judges rules.

[11] Part of the crown's evidence included the post-mortem report which was handed in by consent between the prosecution and the defence. The report showed that the deceased had suffered injuries on the head, chest and leg. The chest wounds were the most fatal and responsible for the deceased's death according to the report. Just before the crown's case could be closed, A1 absconded from the trial which prompted the prosecution to apply for a warrant of arrest. After a long time of unsuccessful execution of the arrest warrant, the prosecution applied for separation of trials. The application was not opposed by the defence – hence the court allowed it.

[12] After the closure of the crown's case, A2 testified under oath and denied commission of the offence. He told the court that the deceased had stormed into his house and demanded the mother of his child who according to A2 was not present in the house. When A2 told the deceased that he did not know the person being sought, the deceased allegedly assaulted him with open hands and with a broom. Warning against such conduct by A1 is said to have been ignored by the deceased.

[13] A2 testified that he called his cousin Sihle Khumalo (pw3) and reported the attack. The cousin advised him to go to his place. In heeding to that advice, he allegedly took a bush-knife and took the direction towards the cousin's place. He told the court that he again met the deceased who continued to assault him. After escaping from the deceased, he allegedly heard noise and later realized that the deceased and A1 were fighting. He mentioned that his cousin proceeded to the two. According to him, A1 later told him that he had stabbed the deceased. His further evidence was that he was advised by A1 to escape into South Africa which he rejected and opted for surrendering to the police. He denied having ever stabbed or injured the deceased in anyway. He was cross-examined at length by the prosecution - contending that his evidence was inconsistent, especially when comparing it with what he had mentioned in the statement recorded before the magistrate.

[14] It has been submitted by the prosecution that A2 is criminally liable for the murder of the deceased. Reliance has been made on the doctrine of common purpose in that regard. The contention by the prosecution was that where two (2) 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 of their member falling within their common design. The case of **Mbabane Tsabedze & Another vs. Rex Criminal Appeal Case No. 29/2011 at paragraph 9** was relied upon in this regard.

[15] It was also argued that even if no prior agreement by the accused persons to commit a criminal offence, common purpose may be inferred from the facts surrounding the active association towards attainment of the common design. The case of **S. vs. Sofatsa and Others 1988(1) S.A 868 (A) at page 898 (A)** was cited in support of this contention. The contention of the crown was that A2 actively associated himself with commission of the crime in various ways. It was submitted that A2 armed himself with a bush-knife and ran after the deceased. Pointing out of the clothes that A2 had been wearing on the night of the incident to the police together with surrendering the bush-knife to the police were construed by the prosecution as evidence that A2 had participated in the killing of the deceased.

[16] The defence argued that no evidence was led to link A2 with commission of the offence. It was also submitted that there was no evidence led to show that there was prior agreement between A1 and A2 to have the deceased killed. Further submission by the defence was that the only evidence adduced by the prosecution linked A1 with stabbing and killing the deceased not A2. The question is whether the crown has succeeded to prove A2's guilt in *casu*.

[17] Our law places the onus on the prosecution to prove the guilt of an accused person beyond any reasonable doubt. See **Bennet Tembe vs. Rex – Criminal Appeal Case No. 18/2012 at paragraph 10**. This burden is not only confined to adducing of strong evidence linking the accused with commission of the offence, but it extends to proving the accused's version to be false beyond a reasonable doubt in the event he gives an explanation. See **S vs Van AS 1991 (2) SACR 74 (W) at 83 A**,

[18] On the other hand the accused bears no burden to prove his innocence or the truthfulness as of his explanation. It suffices if the explanation is reasonably probable. In the case of **S vs. Van der Meyden 1991 (1) SA 447 at 449** this position was expressed by the court as follows:

"The onus of proof in a criminal case is discharged by the state if the evidence establishes the guilt of the accused beyond a reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent..."

[19] In **R vs. Difford 1937 AD 370 at 373** the court had the following to say in this regard:

"...It is equally clear that no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if the explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."

See as well **Bhutana Paulson Gumbi vs. Rex – Criminal Appeal Case No. 24/2012 at paragraph 19.**

[20] The crown's case against A2 is that he is guilty of Murder on the basis of common purpose with A1. According to **Jonathan Burchell in his book titled "South African Criminal law and procedure" - Volume 1 3rd edition**, the doctrine of common purpose at page 307 can be defined as follows:

"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 of their member which falls within their common design. Liability arises from their common purpose to the crime. If the participants are charged with

having committed a consequence crime, it is not necessary for the prosecution to prove beyond reasonable doubt that each participant committed conduct which causally contributed to the ultimate unlawful consequence. It is sufficient that it is established that they all agreed to commit a particular crime or actively associated themselves with the commission of the crime by one of their members with the requisite faulty element (*mens rea*). If this is established, then the conduct of the participant who actually causes the consequence is imputed or attributed to the other participants...”

[21] It should be noted that for common purpose to be established, it is not necessary for the prosecution to prove prior conspiracy or agreement to commit a crime by the criminal group through direct evidence. The law recognizes that besides being proved through direct evidence, common purpose can also be inferred from the conduct of the participants including the facts and circumstances of the case. It is also settled law that common purpose may at times arise spontaneously without any prior conspiracy or agreement between the participants.

[22] In the case of **S. vs. Safatsa and others 1988 (1) SA 868 (A)** at page 898 A and B, the court expressed itself as follows in this regard:

“In my opinion these remarks constitute once again a clear recognition of the principle that in cases of common purpose the act of the participant in causing the death of the deceased is imputed,

as a matter of law, to the participant... It is well established that and can be inferred from the facts surrounding the active association with the furtherance of the common design.”

- [23] See also **Rex vs Sibusiso Shongwe and 15 others – Criminal Case No. 17/1998 at page 4.**

Similarly in the case of **Philip Wagawaga Ngcamphalala and 7 others vs. Rex – Criminal Appeal Case No. 17/2002 at page 3** the court had the following to say in this regard:

“The essence of the doctrine of common purpose is that where two or more persons associate in a joint unlawful enterprise each will be responsible for any acts of his fellows which fall within their common design or object.... The crucial requirement is that the persons must all have the intention to commit the offence.... There need not be a prior conspiracy. The common purpose may arise spontaneously nor does the operation of the doctrine require each participant to know or foresee in detail the exact way in which the unlawful result will be brought about...”

- [24] See also the case of **Rex vs. Njabulo Mtsetfwa and Another - Criminal Case No. 514/2015 paragraph 19.**

Note should be taken that our law provides that mere presence of a person at the scene of crime does not constitute a crime within the ambit of common purpose.

See **Mbabane Tsebedze and Another – Criminal Appeal Case No. 29/2011 at page 13.** For common purpose to be proved, it must *inter alia* be shown that the individual placed at the scene of crime had knowledge of the intended unlawful joint criminal

enterprise. He must have acquired the necessary intention to commit the offence. He must actively associate himself with the common object through participation either by way of assisting, cooperating with a perpetrator, aiding the perpetrator, facilitating, advising or encouraging the perpetrator to commit the crime. In this way and by extension, it must be pointed out that where common purpose has been relied upon, the *actus reus* needs not to always take the form of a direct and physical participation in actual act that brings about the common goal or object. It suffices if the *actus reus* is in a form of active association by way of either assisting, facilitating, cooperating, advising, aiding or encouraging the perpetrator to commit the crime.

- [25] See **CR Snyman – Criminal Law – 6th edition (2014) at 266**. In this regard it is not necessary to prove physical participation in the actual act that brings about the intended common goal. This position was echoed in the case of **Rex vs. Jackelson 1920 Ad 486 at 491** as follows:

“If a person assists or facilitates the commission of a crime, if he stands by ready to assist although he does not physically act, as where a man stands outside a house while his fellow – burglar breaks into the house, if he gives counsel or encouragement, or he affords the means for facilitating the commission if in short there is any, cooperation between him and the criminal then he aids the latter to commit the crime.”

common purpose need not be derived from an antecedent agreement but can arise on the spur of the moment”.

[26] In the case of **R. vs. Nsele 1955 (2) SA 145-152** the appellant joined someone who was intending to commit house breaking and to steal. He had armed himself with a firearm for that purpose and the appellant was aware of that. He proceeded to the targeted shop while the deceased was carrying out business. The appellant was seen entering the shop with the perpetrator and later came out. He looked up and down the road adjacent to the shop. When he returned to the shop, the perpetrator shot the deceased to death with the firearm in an effort to unlawfully deprive him of his money.

[27] It must be noted that the appellant played no role in the actual or physical killing of the deceased. In short, he did not pull the trigger of the firearm that took the deceased's life. He was however, found guilty of murder together with the actual perpetrator under the doctrine of common purpose. In dismissing his appeal, the court held that he was aware that the perpetrator was carrying a firearm and that he reasonably foresaw that there was a danger that the firearm would be used to kill or incapacitate the deceased or any person who would attempt to thwart the common design. It was held that his act of actively associating himself with the perpetrator despite the

said knowledge rendered him equally liable for murder as was the case with the actual perpetrator under the doctrine of common purpose.

[28] In line with the principles expounded above, the court in the case of **S vs. Mgedezi and others 1989 (1) S.A. pages 705 – 706** the court formulated and enlisted the legal prerequisites of common purpose as follows:

1. The accused must have been present at the scene where the offence was being committed.
2. He must have been aware of the intended commission of the offence.
3. He must have been intended to participate in the criminal act.
4. He must have manifested his sharing of a common purpose with the perpetrators by performing some act of association with their conduct.
5. He must have the requisite intention to further the common object and must have foreseen the possibility of its furtherance but continued to perform his own role of association with recklessness as to whether or not the intended criminal object ensued.

[29] It is not in dispute in the present case that A2 was present at the scene where the deceased was inflicted with the fatal injuries that took his life. The only person who partially witnessed what took place at the scene was pw3. Evidence has shown that pw3 was called by A2 to the scene. When he got to the scene he saw A1 on top of the deceased and the two (2) stood up before A3 could clearly see what A1 had been doing on top of the deceased. A1 however allegedly disclosed to pw3 that he had stabbed the deceased. It was pw3's evidence that A2 was standing next to A1 and the deceased. Undisputed evidence is that A2 has been carrying a bush knife. It was also not disputed that A2 was standing next to the two.

[30] Gleaning from the evidence of pw3, it is clear that there was no evidence showing that A2 physically inflicted any of the injuries that caused the death of the deceased. The question however, is whether A2's featurig at the scene can be said to have been 'mere presence' that cannot impute any criminal liability to him for the murder of the deceased in line with the doctrine of common purpose. A further question to be answered is whether it can be said that A2 harboured the requisite intention to participate in the intended killing of the deceased and whether he actively associated himself with the object of the unlawful killing of the deceased.

[29] It is common cause that prior to the death of the deceased, the latter had assaulted and humiliated A2 in the presence of his fiancé. This must have angered him. Not only A2 had allegedly been assaulted by the deceased, but also A1. To demonstrate A2's fury, he proceeded to pw2 to ask her if she was not the one who had set the deceased against him and A1. To further demonstrate A2's fury and his fatal intention against the deceased, he told pw2 that he was going to deal with the deceased in the manner that would cause her to shed tears. This was a clear intention by A2 to fatally deal with the deceased. To buttress this point, A2 armed himself with a bush knife while A1 armed himself with a knife. Both of them took the pathway that had been taken by the deceased.

[30] This court has noted that A2 in his defence has mentioned that his intention was to go to his cousin's place who turned out to be pw3. He mentioned that he took the bush knife for his protection as it was dark. To show that A1 was not being honest, he never went to pw3's place. Even after realizing that pw3 was in the vicinity, he never went to him but he instead called him to the scene where he, together with A1 had besieged the deceased. A1 was allegedly upon the deceased, apparently stabbing him (according to evidence). A2 was next to the two and carrying a dangerous weapon in the form of a bush knife - an instrument capable of causing death. It is important to

unpack and examine A2's conduct and the patterns of his behaviour at this stage.

[31] It has already been shown through the case of **Rex vs. Jackson (supra)** that as part of actively associating oneself with commission of an offence, is to stand by in a position that renders one ready to assist the actual perpetrator. In casu, A2 systematically and strategically stood next to the two who were on the ground. He was armed with the bush knife. It must be emphasized that both A2 and A1 were victims of assault by the deceased. By standing next to them, A2 was not only making the deceased to feel besieged but he was demonstrating to A1 that he was readily available to assist in the event of resistance by the deceased. This had the the effect of encouraging A1 and to give him reassurance of support during the onslaught of the deceased.

[32] The effect of A2's presence with his bush knife next to the deceased while being stabbed rendered him most helpless. It deprived him any ability to offer resistance and free himself since he would fall into the "sword" of A2 as he tried to resist and to escape. The presence of A2 in an armed position, had the further effect of forcing the deceased to submit to the attack. A2's presence in his armed form was deliberate, systematic and strategic in the fatal attack of the deceased. He actively

participated and associated himself with the deceased's killing by his conduct when gleaning from the mode of operation. Indeed, the role of A2 as alluded to above, was a success in the accomplishment of the common goal in that it assisted A1 to fatally stab the deceased unperturbed. His availability at the scene did not constitute 'mere presence', but he was strategically there with the sole purpose and well calculated intention of making A1's job easy.

[33] Had A2 not been intending to assist A1 as described above, he would not have stood next to A1 and the deceased while on the ground. He would have proceeded with his purported journey to pw3's place. Again, to demonstrates that A2 shared common purpose with A1, he joined him after the onslaught, leaving behind the same cousin (pw3) he had earlier claimed to be destined to. He ran away with A1 and disappeared into the darkness. They later resurfaced together after 3 days and requested A2's mother to accompany them to the police station.

[34] In light of the foregoing I am satisfied beyond any reasonable doubt that A2 had the necessary common purpose to have the deceased murdered. He clearly signaled his intention to participate in the killing of the deceased to pw2 when alleging that he would deal with him in the manner that would cause her to shed tears. He then proceeded to arm himself with a bush

knife and assisted A1 in the manner described above. Indeed, pw2 was caused to shed tears. The circumstances were such that it was not necessary for A2 to physically and directly participate in the killing of the deceased as A1 was already effectively doing the job for him. A1's job was effective because of the cooperative assistance by A2.

[35] Even though there was no evidence to prove prior meeting and conspiracy between A2 and A1, their conduct, pattern of behaviour and factual circumstances pointed to one and the only direction that they shared common purpose which had apparently arisen spontaneously as contemplated in the **Philiph Wagawaga Ngcamphala's case (supra)**. The deceased was killed using a dangerous weapon on the fragile area of the body. A2 knew and could see that A1 was armed with a knife. He saw A1 upon the deceased and stabbing him recklessly. He nonetheless actively associated himself with the killing in the manner described above. He therefore cannot escape the criminal liability of the murder of the deceased under the doctrine of common purpose. He is consequently found guilty of murder.

SENTENCE

[36] It is *trite* law that sentencing is discretionary to the trial court and that such discretion must be exercised judiciously. See **Nkosinaye Samuel Sacolo vs. Rex - Criminal Appeal Case No. 37/2011 paragraphs 2 – 4.** See also **Elvis Mandlenkhosi Dlamini vs. Rex – Criminal Appeal Case No. 30/2011 at paragraph 29.** This may include taking into account all attendant facts and circumstances of the case. In that regard the court may have to consider the nature and seriousness of the offence, the interests of the offender and those of the society. The court must then strike a balance between those competing interests. This sentencing procedure is known as the triad. See **Rex vs. Majahonkhe Major Mazibuko and Another – Criminal Case No. 3/2002 at page 2.**

[37] In the case at hand the court has considered that the accused is the first-time offender. He has three (3) minor children to maintain. Evidence was adduced that the deceased was the

aggressor in that he assaulted the deceased for no good reason. This was an act of provocation on the part of the deceased. It has also been taken into account that the accused cooperated with the police at the time of his arrest and also complied with his bail conditions. It has also been taken into account that the deceased was 29 years old and still youthful at the time of commission of the offence. The court has also considered the seriousness of the offence and its prevalence in the society. The accused person however acted excessively in the circumstances and caused unnecessary loss of life in the process.

- [38] It is incumbent upon the courts in the face of violent crimes, especially those involving loss of lives to pass effective sentences that will deter not only the offender but also other people who may be tempted to commit similar offences. However, much as deterrent sentences are desirable, the courts must also strive to pass sentences that will be blended with a measure of mercy so as to enable the offender to reform and to be swiftly reintegrated

into the society. See **Ntokozo Dlamini & Another vs. The King - Criminal Appeal Case No. 10/2021.**

[39] It is also trite law that before the court can pass sentence, it must indicate whether or not extenuating factors exist. See **Section 295 (1) of Criminal Procedure and Evidence Act 67 of 1938.** Also see **Mandla Tfwala vs. Rex (supra) at page 8.** It is also the position of our law that the onus to show existence or otherwise of extenuating factors lies with the trial court. See **Daniel Mbudlwane Dlamini vs. Rex – Criminal Appeal Case No. 11/1998.** In the leading case of **S. vs. Letsolo 1970 (3) SA 476 (A) at 476** extenuating factors were defined as facts bearing on the commission of the crime which reduce the blameworthiness of the accused as distinct from his legal culpability. Three factors must be considered being:

1. Whether, there are any facts which might be relevant such as drug abuse, immaturity, intoxication or provocation (the list is not exhaustive).
2. Whether such facts in their cumulative effect probably had a bearing on the accused's state of mind at the time he committed the offence.
3. Whether such facts are sufficiently appreciable to abate the blameworthiness of the accused.

[40] It has been shown that the accused person was youthful at the time of commission of the offence. There is no doubt that immaturity may have played a role in influencing him to commit the offence. The position of our law is that youthfulness is an extenuating factor. See **Ntokozo Adams vs. The King – Criminal Appeal Case no. 16/2010 at page 13**. Also see **Rex vs. Khethinkosi Simelane and 2 others – Criminal Case No. 96/2017 at paragraph 34**. As also alluded to above, the accused person had been provoked at the time he committed the offence. It is also trite law that provocation is an extenuating factor. See the case of **Rex vs. Linda Nkosinathi Matsebula & Another – Criminal Case No. 322/2017 at paragraph 25**. Again, when passing sentence, this court has considered the contemporary sentencing range and trends in similar crimes.

[41] In light of all the foregoing, having considered all the facts and circumstances of the case inclusive of the personal circumstances of the accused, his interests including those of the society and having struck the necessary balance thereof, this court finds it fair and just to sentence the accused to fifteen (15) years imprisonment without an option of a fine. A total of

208 days being the period spent by accused in custody before liberation on bail shall be deducted from his sentence.



D.V. KHUMALO
ACTING JUDGE OF THE HIGH COURT

For the Crown :	Piposiarova J.
For Defence :	Dlamini L.