

IN THE HIGH COURT OF ESWATINI

CASE NO. 261/2018

HELD AT MBABANE

In the matter between:

REX

AND

SIFISO VINCENT MAVIYO SIKHONDZE

SIBUSISO PATRICK MABHALANE SIKHONDZE

***NEUTRAL CITATION: REX VS SIFISO SIKHONDZE & ANOTHER
(261/2018) SZHC – 248 [11/10/2023]***

CORAM: BW MAGAGULA J

**HEARD: 06/03/22, 06/04/22, 12/04/22, 01/06/22, 07/06/22,
18/07/22, 11/09/22,14/09/22, 26/09/22, 17/11/22,
21/11/22, 15/12/22, 15/02/23, 16/02/23, 27/03/23,
03/04/23, 30/05/23, 18/07/23**

DELIVERED: 11/10/2023

SUMMARY: Murder – Requirements of circumstantial evidence revisited- Requirements of a murder charge being mens rea and actus reus – no evidence even circumstantially pointed to the commission of the offence by both Accused – Defence has succeeded to create doubt in the cause of death of the deceased – No direct causal link of role played by both Accused persons that led to the death of the deceased – Accused not guilty –Acquitted.

JUDGMENT ON ABSOLUTION FOR INSTANCE

BW MAGAGULA J

BACKGROUND FACTS

- [1] The two Accused persons are biological brothers. They stand arraigned on a charge of murder. They are alleged to have murdered one Machawe Kunene on the 3rd of August 2018, who will hereinafter be referred to as the deceased.
- [2] The offence is alleged to have taken place at or near Hluthi area in the Shiselweni District. They are also alleged to have acted in furtherance of a common purpose when committing the said crime.
- [3] At the commencement of the trial, when the charge was put to both of them, they pleaded not guilty. The onus is then on the crown to prove the commission of the offence in all aspects, beyond reasonable doubt.

- [4] The crown led a total of 8 witnesses to prove it's case. The defence only led 3 witnesses including both Accused persons.

The summary of the crown's witnesses

PW1 – Ayanda Kunene; PW2 – Simanga Mkhonta, PW3 – Phesheya Mafu.

- [5] PW1 and PW2 in summary told the court that they both know the Accused persons. Both of them corroborated each other in that they saw Accused no.1 and no. 2 assaulting the deceased. They told the court that Accused no. 1 used a stick, which they referred to as Sikhwili. PW2 said since it was dark outside, he could not see the exact parts of the deceased body where he was being assaulted. But at some point he was lying down.
- [6] PW1 and PW2 further informed the court that they also saw both the Accused persons bundling the deceased into the Toyota corolla a vehicle which it is common cause that it belongs to Accused no. 1. PW3 also confirmed that the deceased was bundled into the car boot, however he said it is Accused no. 1 who did so. After he had bundled the deceased into the boot, he then called his younger brother (Accused 2) to drive the motor vehicle. PW1 and PW2 were unionism in their testimony that after the deceased was bundled into the car boot both the Accused drove off with him in the same vehicle. They took the direction to Hosea.

[7] PW1 also told the court that the person who slapped the deceased with open hands was Accused no.1, the same Accused who assaulted the deceased with a stick. The exact body part where PW1 says the Accused assaulted the deceased was on his left hand. PW2 on the other hand told the court that the deceased was assaulted by both Accused persons all over his body whilst he was lying down. PW1 also told the court that he was also assaulted by both the Accused persons.

PW4 Velemseni Kwanda Xaba

[8] This witness to a large extent narrated the very same story as told by PW1, to the effect that they were enjoying alcoholic drinks at Mgodzini bar. They were with Melusi Lushaba, Simanga Nkosingiphile Mkhonta and the deceased Machawe Kunene. At some point they went outside the bar when they heard noise. They found both Accused persons assaulting Ayanda Kunene who they were questioning about the whereabouts of the deceased, Machawe Kunene. He is said to have broken into Accused no.1's motor vehicle, a Toyota corolla. Whilst they were engaging with both the Accused, Machawe Kunene emerged. The Accused are said to have stopped assaulting Ayanda Kunene and began assaulting Machawe Kunene.

Cross examination of PW1 – PW4

[9] PW1 who is Ayanda Kunene was cross examined at length by the Defence Counsel Mr B. Xaba the following came out in the cross examination;

- 9.1 That the witness came to court from Bhalekane Prison where he is serving sentence for possession of dagga.
- 9.2 That on the fateful evening this witness had consumed alcohol and he was drunk as such he does not recall clearly why his deceased brother was being assaulted. He said this when it was put to him that his younger brother was being beaten for allegedly breaking into Accused no.1's car and stealing a radio and a sum of money cash amounting to E3 000-00 (**Three Thousand Emalangi**).
- 9.3 He admitted that he was carrying a knife on that date which he intended to defend himself in the event something befell him. It also transpired during his evidence that he did not produce the knife when he was accosted by Accused no.1 and Accused no.2, but Accused no.1 saw the knife in his back pocket and he took it from him.
- 9.4 He conceded that he once had a brush with the police where he was accused of assaulting his girlfriend. The following question and answer also took place during cross examination;

Q – In your evidence you told the court that your younger brother was assaulted with a stick at the back of his body and other parts of his body. Who was assaulting him and with what?

A – It is Maviyo (Accused no.1) I cannot say who amongst them, he was the one I last saw carrying the stick. But it is the two of them they were together.

Q – Your evidence now is that you are not sure who assaulted your brother as you were a distance away?

A – It is both of them, is Maviyo who was carrying a stick.

Q – Did you witness that or you assumed that, since he was carrying a stick he is the one who was assaulting him?

A – It is first Accused I witnessed that.

Q – Where on his body was he being assaulted?

A – In his head and on his body.

Q – How many times was he beaten on the head?

A – Once on the head and on the body and then I sat down as I was in pain.

Q – What do you mean by dragging on the ground?

A – They were holding him by his clothes dragging him to the car.

Q – First Accused will tell the court that when they met your brother whilst in the company of the second Accused person he was in possession of his car radio which he claims to have picked it up from the ground. Yet it was the one that had been retrieved from his motor vehicle?

A – I do not know that.

[9] There is also another pertinent line of questioning surrounding the issue of whether the deceased was bundled into the boot of the first Accused's car. It also came during cross examination which is as follows;

Q – After the deceased was hit on the buttocks, your friends retaliated by throwing stones and beer bottles at them. The Accused then let go of the deceased, they never bundled him into the boot of the car.

A – They did chase them carrying stones, but I had been hurt at the time.

[10] PW1 was also questioned at length on why when arriving at his home, he did not inform his mother that his late brother, the deceased had been bundled into a car boot and taken by the Accused. His response to this question was that it was late at night and he was tired. He only woke up the following day as he slept until late. That is when he was sent by his mother to look out for his brother and that is how he discovered that he had been found dead by the side of the road. There was no re-examination.

PW4 – Mdumiseni Lushaba

[11] In a nutshell, this witness told the court that he does not know the Accused persons. He proceeded to tell the court that on the 04th August 2018, he had gone to attend a funeral at KaChief Bhejisa Lushaba. Whilst he was there his son Menelisi Lushaba phoned to ask for help as his motor vehicle had broken down. He then drove with his other son Melusi to assist him. While they were on the road to Sihlutse at a place called Emsengeni, they saw a person lying down on the side of the road in an awkward position. The time was early in the morning at around 3:30am. They stopped the car and went to inspect the person who was lying down. They realized that this person was still and unresponsive. After they saw the person his son called the 999 which is the police free toll line

[12] He also told the court that he saw traces of blood at the back of his head and his head was next to the tarmac. After calling the police, they proceeded with their journey. On their way back, they found police officers at the scene. They stopped and his son Melusi told the police that he is the one who called them earlier through the hotline 999. He then recorded a statement with the police

[13] This witness was cross examined briefly. It was put to him whether he knew that why his son did not come to give evidence. He was also asked whether he inspected the body and noticed any stab wounds. This witness responded by saying that he did not notice any stab wounds except for small traces of blood.

PW5 - 5008 Constable Samuel Vilakati

[14] This police officer told the court that he was on duty on 04th August 2018. In the company of 7294 Constable Simelane, they received a call at 3:30am that a motorist had come across an unresponsive body on the MR3 gravel road. They proceeded to the scene where they found a BMW parked. They also found unresponsive body. Also there was Mdumiseni and Melusi Lushaba. The latter was driving. In front of the motor vehicle, about 5 meters that is where lay an unresponsive body. He proceeded to the body to check the pulse. There was none. He also noticed blood coming out from the back of his head. He lay in an awkward position, his hand on the tarmac. He also had dry blood on the mouth and on his nose.

[15] He also noticed some shoe marks on the ground as the weather was drizzling. He then called the in charge of the CID. They remained on the scene to safe

guard the crime scene until the morning when the scenes of crime personnel arrived. He continued to tell the court that as the scenes of crime officers were executing their duties, he noticed that the body had bruises at the back, he also had a gaping wound at the back of his head.

[16] He told the court that there were shoe prints on the ground, which made him to suspect that there was another crime scene before the person was brought there. The deceased was wearing black takkies, blue jeans, white T-shirt and a sweater.

[17] This witness continued to tell the court that another motorist arrived and stopped. He introduced himself as Mafu. He informed them that he was able to recognize the deceased. He is the same young man who was being assaulted the previous night at Mgodzini bar. The officer told the court that he was then taken by the CID officers to the police station for further questioning.

[18] This witness continued to tell the court that later on in the day, after the CID officers had done their investigations, he then established that the name of the deceased was Machawe although he was not sure of the surname. He told the court that maybe it's Kunene. He continued to show the court the clothes that the deceased was wearing. This witness was also cross examined. What came out during the cross examination is that this witness noticed a wound at the back of his head, but he was not sure whether it was a stab wound. It also came out during cross examination that the deceased had bruises on his body. There was no re-examination of this witness.

PW6 – 5380 Detective Constable Thulani Israel Gama

- [19] When giving evidence, Thulani Israel Gama introduced himself as a member of the Eswatini Royal Police based at the Shiselweni Regional Head Quarters.
- [20] He currently performs duties as crime scene investigator and photographer. He informed the court about all his academic qualifications and work experience. As such, it is not necessary to outline in detail they are not in issue. He told the court that he has 16 years' experience as a police officer, 13 years of which he has been a crime scenes officer. He confirmed that he is the officer who attended to the scene pertaining to the matter at hand. He did so on the 04th September 2018. He told the court that on the fateful day, he reported out to Mntoyedwa in the Hluthi area at a Sikhondze homestead, where he found other police officers. Especially the officers in charge of Lukhozi.
- [21] He also told the court that after the necessary cautions in terms of the judges rules, a suspect in the name of Sibusiso Mabhalane Sikhondze pointed out a bottle green Toyota corolla, which had been parked in the homestead. He photographed the motor vehicle and he also opened the doors of the motor vehicle with the intention to search inside.
- [22] The suspect at the time, Accused no.2 pointed out at the back of the seat as where he bundled the deceased before he was found dead. He photographed the seat. The suspect proceeded to his room where he produced clothing that he had worn on the day. He took photographs of the clothes together with a

knife that had been there. He continued to tell the court that since it was dark he could not collect the fibers from the back seat of the motor vehicle.

[23] This necessitated that the following day being the 05th September 2018 he returns to Hluthi Police Station, to lift the fibers from the back seat of the said motor vehicle. He did this for purposes of forensic examination. Whilst he was at Hluthi, this witness told the court that the investigating officer PW7 brought the suspect Sibusiso Sikhondze. He was then joined by Sifiso Vincent Sikhondze, who it is common cause that he is Accused no.1.

[24] In front of the Hluthi Police Station there was a certain motor vehicle, a Toyota Hilux van registered KSD 312 AH. The Accused were standing next to it. After the due warnings, Accused number 1 pointed out something inside the motor vehicle. He took photographs after the car had been opened and behind the seat the suspect pointed a wooden button, as the one that was used to assault the deceased.

[25] At the end of his testimony, this witness handed over the photographs of all the exhibits he photographed. During the cross examination, this witness confirmed that in as much as he collected the exhibits and uplifted the fibers for forensic examination at the forensic laboratory in Pretoria. He unfortunately then learnt later on that the exhibits were not conveyed to Pretoria for the forensic examination.

- [26] In a nutshell, he conceded that whatever fibers he uplifted from the back of the seat were not taken for forensic examination. He also confirmed that the Toyota corolla which was taken from the Sikhondze homestead was kept at the police station for 3 months. The reason that had been given to the owner who is Accused no.1, was that it was kept for purposes of being taken for forensic examination.
- [27] The officer confirmed that despite the period of 3 months, no forensic examination was conducted on the motor vehicle. The officer also conceded that despite having said during his evidence in chief, that when Accused no.2 pointed to the back of the seat being where the suspect said they bundled the deceased to, during cross examination when it was put to him that such an utterance could not have constituted a confession. The reason being that the suspect was never taken to a judicial officer to make a confession. He conceded and further added that he heard, but he was not the investigating officer.
- [28] It was then put to the witness that in his 16 years of experience as a police officer, he should have known that he should not have disclosed that portion of incriminating evidence from the suspect in his affidavit, especially if it was made outside the normal procedures of a formal confession. He again conceded to that statement put to him. The officer also confirmed that he does not have any forensic evidence linking the Accused persons to the commission of the offence.

[29] Mr Gama also confirmed during cross examination that the boot of the bottle green Toyota corolla did not open and he had been informed of that fact by Accused no.2. This he said happened when he instructed Accused no.2 to open the boot, when he wanted to take photographs. That is why he indeed confirmed that the boot was not functioning and it could not open.

PW7 – 6222 Detective Constable Mzwandile Dlamini

[30] This witness is the police officer who is the investigator of the case. He informed the court more or less the same version that had been given by his colleague PW5 Constable Samuel Vilakati, regarding how the body of the deceased was found next to the road. He only added the detail that half of his body was on the tarmac and his legs was on the gravel. To a large extent, the facts of how the deceased was discovered are common cause. The court need not regurgitate those facts as they are already part of the judgment. What came out of this witness though, is that whilst they were on the scene, Phesheya Mafu (PW3) arrived at the scene. He confirmed that the deceased was the same young man who had been assaulted by Accused no.1 and Accused no.2 outside Mgodzini bar the previous night.

[31] The witness said he was told by the said Phesheya Mafu that the deceased was bundled into the car boot and both the Accused persons drove with him in the bottle green Toyota corolla towards the Hosea direction.

[32] This witness proceeded to tell the court that 3 other young later on came to the police station. They are Ayanda Kunene, Simanga Xaba and another one whose name he had forgotten but he said he was a Mkhonta.

[33] During the cross examination of this witness, it was put to him that from the place where the allegedly bundling of the deceased into the boot took place, the police station was situated 100meters away. It was therefore put to this witness that, does he not find it strange that the boys who told him that they saw the deceased being bundled into the boot by the Accused, could not after that incident simply walk to the police station to report that the deceased had been bundled into a boot and taken away?

[34] In response, the officer said one of the 3 boys had alleged he had met certain traffic police officers and told them of that fact. When probed further as to who is that boy the officer said he was not sure of the name, but it is between Ayanda Kunene and the Xaba boy.

[35] It was put to this witness that is he not surprised that none of the witnesses that have been before court ever mentioned the reporting of the bundling of the deceased into the Accused's motor vehicle? The officer said he would not know what the previous witnesses had said before court. The officer also confirmed during the cross examination that he was told that the deceased was bundled into the boot of the bottle green Toyota corolla.

PW8 – Doctor Swapnika Enugala

[36] This is the police pathologist. She told the Court that she is employed as such by the Eswatini Royal Police. She related to the Court all her academic medical qualifications. They are not in issue. She told the court that she joined the police force as a police pathologist since 15th February 2022. She handed over to the Court report on post mortem examination of one Machawe Kunene. She confirmed that this report was prepared by pathologist Dr Komma Reddy. She interpreted the anti-mortem injuries appearing on paragraph 1 to 4 of the report where she stated that it contained the following injuries;

1. Contusions of 8x5cm, 6x5cms and 11x8cms, present on the head.
2. Abraded contusions of 13x8cms and 11x7cms, present on the front portion of the abdomen.
3. Abraded contusion of 12x10cms, present on the lower back.
4. Pubic bones fractured.

[37] She confirmed that the kind of weapon that could have inflicted these injuries was a blunt force or trauma. She said the possible cause of these injuries could either be through a traffic accident, blunt weapons like a stick, metal rock or a stone not capable of cutting through the body. Fisting, kicking, stomping or any blunt object.

[38] During cross-examination she was asked which one amongst the injuries that are reflected in the post mortem report could she say were fatal? Her response was that she needed to put the injuries together, injury number 1 and 2 and

those mentioned on page number 3. All these injuries put together could be fatal. She proceeded to analyze injury number 2 on page 2 of the report, along with those mentioned in column 30, 31 and 32 could also be fatal. In particular, injury number 30 which she described as being vessels to the intestine. Injury number 31, rupture of the liver. Injury 32, rupture to the spleen. She told the Court that all these injuries are equally fatal. Injury number 3 mentioned in page 2 can also be corresponded with the injuries mentioned in columns 30, 31 and 33 and injury number 4 fractures on the pelvic bones. She told the Court that important blood vessels could be crossing at this point. In as much as she could not say which is more or less fatal amongst these. The post-mortem report was handed in by consent in terms of **Section 221 of Criminal Procedure Evidence Act.**

Analysis of the evidence

[39] After hearing the evidence adduced by the Crown and the defence the following facts appear not to be in contention;

39.1 That the deceased Machawe Kunene died. It is not clear exactly when did the deceased died? But he died between the night of Friday the 3rd and probably early hours of the morning of the 04th of August. I say so, because there is a disconnect in the evidence between the assault by the Accused and when the deceased eventually died. The evidence appear to be uncontested that at the time all the witnesses saw him. During or subsequent to the assault he was alive, and then the evidence that then subsequently comes is when he is found dead on the side of the road. That is

why in my analysis I conclude that there is a disconnect as to when exactly did he die.

39.2 I also make a finding of fact that the first Accused did assault the deceased. In fact he says so in his own words during his testimony in his defence. He concedes that he did assault the deceased. However, but he qualifies his statement by saying the intensity of the strokes that he administered was minimal and could not have been fatal. Specifically, he told the court that he hit him three times on the buttocks and once on his left arm. Hence, I accept that the first Accused did assault the deceased. There appears to be contention on the exact part of the body where he was assaulted. Ayanda Kunene alleges that the deceased was assaulted all over the body including his head. Mr Pshesheya Mafu also says so. However, both the Accused and DW1 Bongani Sikhondze refute that he was assaulted on the head. In fact Accused no.1 says Pshesheya Mafu also participated in the assault when he slapped the deceased with an open hand on his face. How credible then can PW2's evidence be when at some point he participated. Can it not be that he is attributing all wrongdoing to the Accused to deflect attention from himself?

[40] There are also variances and inconsistencies and contradictions in the evidence adduced by the Crown. They appear as follows;

40.1 Whilst PW1 and PW2 informed the court that both Accused persons bundled the deceased into Accused no.1's car boot, PW3

told the court that the deceased was bundled into the car boot by Accused no.1 alone and then he called Accused no.2 to drive the car.

- 40.2 Whilst PW1 and PW2 informed the court that after having bundled the deceased into the car boot, both Accused persons drove with the deceased in the car boot and took the Hosea direction. PW3 told the court that after the deceased had been bundled into the car boot, Accused no.2 drove away in the car while Accused no.1 was left behind and used his own motor vehicle (van) and left the place.
- 40.3 Whilst PW1, PW2 and PW3 informed the court that the deceased was bundled into the car boot. PW7 told the court that when he instructed Accused no.2 to open the car boot, the Accused told him that the boot was not operational hence it could not open. PW7 told the court that he tried to open the car boot himself but failed.
- 40.4 PW1 informed the court that he was only slapped by Accused no.1 with an open hand and further beaten by Accused no.1 with a stick on his left hand. Contrary to PW1, PW2 told the court that PW1 was assaulted by both Accused persons all over his body as he was lying down, further Accused no.1 used a stick to assault PW1.
- 40.5 PW1 further informed the court that he was only slapped by Accused no.1 with an open hand. PW2 told the court that also Accused no.2 also slapped him (PW2) and PW1 with open hands.

40.6 In as much as PW1 informed the court that the deceased was only hit with a stick by Accused no.1, PW2 told the court that the deceased was assaulted by both Accused persons with dangerous weapons and that Accused no.2 assaulted the deceased with a sjambok (insilane).

40.7 Whilst PW1 informed the court that Accused no.1 only slapped him with an open hand and further strike him with a stick on his left hand on the other hand, PW3 told the court that Accused no.1 squeezed PW1's testicles and struck him on his back with a stick whilst lying down.

40.8 PW1 informed the court that Accused no.1 assaulted the deceased with a stick as Accused no.2 was holding him with his clothes. On the other hand, PW2 told the court that both Accused persons assaulted the deceased. PW3 never mentioned any role played by Accused no.2 in the assault of the deceased.

THE LAW

[41] In light of the fact that the Accused persons face the charge of murder. It is important that the court revisits the legal position that must obtain before an Accused is convicted on a charge of murder.

[42] Murder is defined as the unlawful and intentional causing of death of another human being.¹ There are three essential requirements for murder. It is causing

¹ Ndhlovu vs S 1945 AD 369 373

the death of another person, unlawfully and intentionally. In the matter at hand, the charge is laced with common purpose. In the matter of **Sofatsa vs S 1988 (1) SA 8 AD**, the court stated that the essence of the doctrine of common purpose is that where two or more person's associates in a joint unlawful enterprise, each will be responsible for any acts of his fellows which fall within their common design or object.

[43] The crucial requirement is that the persons must all have the intention to commit the offence. See the case of **Phillip Wagawaga Ngcamphalala and 7 others vs Rex, court of Appeal Case No. 17/2002** at pages 3.

[44] 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 may in which the unlawful result would be brought about².

[45] In the Phillip Wagawaga Ngcamphalala case (supra), the court provided a qualification to the legal principle, where it was stated that it was necessary for the Crown to establish that each participant had the necessary *mens rea*. It must be shown that he/she knew or must have known that the crime was likely to be committed by one of his associates. Either participated therein or agreed by words or conduct to associate himself with the act or acts of his associates.

² See S vs Shezi 1948 (2) SA 11AD and also S vs Trosae 1951 (3) SA 405

[46] In the **Phillip Wagawaga judgment**, the Court of Appeal emphasized that mere presence during the commission of a crime, does not in itself constitute an implied common purpose with the actual perpetrator or perpetrators. The court must be satisfied that an Accused had a common intention with members of a group which perpetrated in an unlawful attack and was not a mere spectator.

[47] The court must therefore analyze and consider the evidence against individual Accused alleged to have acted in common purpose with another or others.

ADJUDICATION

[48] It is imperative that the conduct of each Accused person as per the evidence presented in court is analyzed closely to determine the extent in which it is alleged that, he contributed to the act of killing and to what extent did he contribute in common purpose with the other. I will commence by the evidence led against Accused no.1.

[49] The Crown in its submission persuades this court to find that the conduct of both the Accused in assaulting the deceased with a stick and bundling him into the car boot and dumping him by the road falls squarely under the *dolus eventualis*.

[50] The court discerns to analyze the evidence to ascertain if the evidence adduced before court supports this argument. With regard to the beating, I have already

pointed out earlier, that it is not in contention that the first Accused did beat the deceased. He has admitted to doing so himself in his evidence. There is a disconnect though, between the evidence adduced by the Crown which is that of Ayanda Kunene and Phesheya Mafu, regarding the extent and specifics of the part of the body where the injuries were inflicted.

- [51] For the Accused persons to be found guilty of murder, the evidence adduces must demonstrate clarity that the injury that ultimately led to the demise of the deceased were the ones inflicted by the Accused. When one juxtaposes that the evidence adduced before court pertaining to the assault by Accused no.1 and the injuries that are said to have caused the death of the deceased, as set out in the post mortem, it warrants further consideration and analysis.
- [52] Dr Komma Reddy in his post mortem report, states that his observations which were done on the 8th August 2018 a couple of days later after the body was found on the side of the road, reflect contusions of 8x 5cm, 6x 5cm and 11x 8cm present on the head. Abraded contusions on the front of the portion of the abdomen. Abraded contusions present on the lower back. Also a pubic bones were fractured.
- [53] Then the question that begs an answer is, at what point were the injuries as reflected on the post mortem report inflicted on the deceased? The evidence that is before court regarding the assault by Accused no.1 does not support the extent of the injuries as reflected by Dr Reddy. In fact the Crown has demonstrated through the evidence led beyond reasonable doubt that both

Accused persons bundled the deceased inside the car boot and dumped him by the road. There is contradiction in the evidence of the witnesses themselves. First, the act of bundling him into the car boot itself. The evidence regarding the Accused bundling the deceased inside the boot was not clear during the trial especially as to who did the bundling. PW1 and PW2 say both Accused carried out the act of bundling. Yet PW3 told the court that it is Accused no. 1 who did the act. In such circumstances, which version should the court consider as credible?

[54] Both police officers who gave evidence conceded that none of them was open the boot. This gives credence to the Accused version that the car boot was malfunctioning and could not open? In fact one of the police officers told the court that he made the attempt to open the boot but it did not open hence, he decided to access the boot by lowering the rear seat to see the boot. This then gives weight to the narrative that the deceased could not have been bundled into the boot as it could not open. This conclusion seriously do not have credibility of all the witnesses that told the court that the deceased was bundled into the boot.

[55] PW6, Detective Gama informed the court that on the 5th August 2018 he took the fibers from the car seats for forensic examination purposes. Despite that the car was detained at the police station from the 4th August until the 14th October, no attempt was made to open the car boot. As such, there is no evidence even through the fibers that could have been up lifted from the car boot, to show that the body of the deceased may at some point, could have

been in the car boot. How can then the court consider as an accepted fact, that indeed the Accused was bundled inside the car boot.

[56] The other leg of the Crown's submission, which I also find that is not supported by evidence, is that it is both the Accused persons that dumped the deceased by the road side where he was found dead. There is absolutely no evidence that was submitted before court to that effect. None of the witnesses actually testified that it is any of the Accused persons that dumped the deceased by the road side where he was found. There is a whole lot of possibilities on how he could have come to be on the road side. Unfortunately, no evidence has been led before court to connect the presence of the deceased by the road side with the Accused.

[57] The evidence by Ayanda Kunene and Phesheya Mafu to the effect both Accused bundled the deceased in the car boot is incredible. The car boot could not open. It then remains unclear what happened to the deceased after he was assaulted. Did he tried to walk home and died in the process? To pin the presence of the deceased by the side of the road on Accused without any direct evidence before court signifying so, would be a travesty of justice. There is a whole lot of possibilities that could have happened to him.

See: **Malangeni Raphael Dlamini vs Rex Criminal Appeal Case No. 25/2014.**

[58] With regard to the role played by Accused no.2, linking him to the commission of the charge, PW2 told the court that the deceased was assaulted by both Accused persons all over his body whilst lying down with Accused no.1 using a stick. Yet, PW1 had informed the court that the deceased was only hit with a stick by Accused no.1.

[59] Clearly there is an inconsistency between the versions of these two witnesses regarding to how the deceased was assaulted. This is important because it is key to know who inflicted the injuries. It is another enquiry whether it is the injuries that were inflicted that caused the death. When considering the Crown's own evidence even without considering the version of the Accused, how does the court elect which version is correct, between the version by PW1 and PW2 as to who assaulted the deceased.

[60] That actually takes care of one issue being the assault. The second leg which the evidence must talk to is whether the injuries inflicted by the assault were to the extent and magnitude that could have caused the deceased to die. From the Crown's version, it is said the evidence links both of them as the submission is that they both assaulted the deceased while lying down. But the evidence does not say that he then died subsequently. Even if it could be argued that the timing is irrelevant as long as it is the injuries that caused his death. The void on the events of how he got to be found dead next to the road, puts a spanner on the works.

[61] When was the deceased last seen alive. The Accused no.1's version is that as they were holding him and walking with him to the police station, they were with PW3 accosted by the deceased's friends who pelted them with stones. In the process, they let go of the deceased who ran away. What then boggles the mind is that if the injuries were so fatal that could have led to his death, how come he was able to bolt and run away?

[62] It is therefore the observation of the court that even when applying common purpose principle the joint enterprise being the assault, it is difficult to connect because of the inconsistency in the Crown's witnesses.

[63] The Crown has urged the court to consider and apply the principle of circumstantial evidence and find both of the Accused persons guilty. It is opportune that the principle be considered in detail. In the matter of the **King vs Zama Augustus Simelane**³ His Ladyship M Langwenya J stated the position of the law to be as follows;

63.1 In evaluating the evidence the court is quilted by the cardinal rules of logic set out by **Water Mayer JA in Rex vs Blom 1993 AD 188 at 202 – 203** where the following was said;

[64] Two cardinal rules of logic which could not be ignored when it comes to reasoning by inference are;

³ [270/2015 [2019] SZHC 154 (15 August 2019)

- a) The inference sought to drawn must be consistent with all proved facts. If it is not then the inference cannot be drawn.
- b) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inference then there must be a doubt whether inference sought to be drawn is correct. See the case of **The King vs Zama Augustus Simelane [270/15] [2019] SZHC 154 (15 August, 2019)**

[65] The Crown submits therefore that the evidence of PW1, PW2 and PW3 point directly to the Accused persons as the one who assaulted the deceased and bundled him into the green Toyota corolla sedan. I have already found that it is not contested that at least Accused no.1 assaulted the deceased. As to whether both Accused persons bundled him into the green Toyota corolla there is contradictory evidence.

[66] The circumstantial evidence argument that the Accused persons were the last one to be seen with the deceased and as such the only inference to be drawn is that they are the ones responsible for the death of the deceased cannot be applicable. First, there is no clear evidence before court that they were the last one to be seen with the deceased. The first Accused's version which was not challenged during cross examination, is Phesheya Mafu and the first Accused were holding the deceased en-route to the police station. In the process, he escaped when a group of his friends pelted them with stones. That is the version of the first Accused regarding when the deceased was last seen. With

the two contrasting versions of the Crown witnesses and the version of the first Accused which was not challenged, it is difficult for the court to accept that there is clear evidence that the deceased was last seen with the Accused persons.

[67] It is on that basis, that the court finds that it has not been established as a matter of undisputed fact that the Accused were the ones that were last seen with the deceased. At least Phesheya Mafu (PW3) is also alleged to have been there when the deceased bolted away. Again, the common purpose principle cannot be applied fully in this matter. First, not all the facts that have been proved. Second, the inference to be drawn is not consistent with all the proved facts because for instance, the fact that the deceased was last seen with the Accused has not been established beyond reasonable doubt. Further, the other crucial fact being that the deceased was bundled into the green Toyota corolla has not been established. Therefore, the factual circumstances of this matter do not fit the requirements of circumstantial evidence as stated in the **King vs Zama Augustus Simelane** case (*supra*).

[68] The Crown has also argued that the defence failed to put the version that the stick which was used to assault the deceased was in the Toyota corolla, not the van. In as much as the legal principle as stated in the **Malungisa Antonio Bataria vs Rex (06/2014) SZSC 45 (3rd December 2014)** is correct, where the court stated that the duty rests on an Accused in a criminal trial, to put so much of his case to every state witness. The question that stands to be answered, pertaining to the issue of the stick is what evidential value the

situation of the stick add in proving the Crown's case. Especially after the court's finding that the first Accused admitted that he assaulted the deceased with the stick. However, what he contends is that the nature of the injuries that may have been inflicted by three strokes could not have caused the deceased's death. That is the issue.

[69] Therefore, even if the court would agree with the Crown that this version was not put to the Crown's witnesses, it does not add much weight to the Crown's case. The Crown ultimately has the onus of adducing evidence beyond reasonable doubt to prove the commission of the crime. Many doubts have been highlighted in the Crown's case. Even if the court discounts the version of the stick, on the evidence as it stands, it is insufficient for a conviction of the Accused persons.

[70] The court admonishes the conduct of the Accused persons of taking the law into their own hands by assaulting the deceased. There is no reason why the Accused could not have gone to the police station which is reportedly to be a walking distance from the place where the alleged theft of the radio took place.

[71] The evidence is blurred on whether the acts of the Accused persons whether jointly or individually qualify as the cause of death of the deceased. There is a disconnect in the evidence, as to what happened to the deceased between the period after he was allegedly assaulted outside Mgodzini bar and the time when he was found dead next to the road. The Crown has argued that the Court should draw an inference circumstantially that since the deceased was last

seen being bundled into accused number one's vehicle, then it should be presumed that he died under their hands. The problem that is inherent in this argument is that the evidence that the deceased was bundled into the vehicle belonging to Accused no.1 is on it's own insufficient.

[72] As it has been outlined earlier in the judgment, the Crown's witnesses are not consistent in their versions on what happened. PW1 especially, admits that he was drunk on the night. He had also been assaulted and as such he was not at his best. Secondly, if the deceased was bundled in the boot of the Toyota corolla, how could that have been possible if the boot could not open due to malfunctioning? Thirdly, if it is true that he was bundled into the boot and if for a minute the Court would accept that the deceased had been assaulted on the head and would have been bleeding, how come PW6 the scenes of crime police officer said when he piped at the boot through the rear seats, he could not see traces of blood. It is worse that the fibers which were taken both from both the boot and the rear seats were not taken for forensic examination.

[73] The laboratory results could have shown that either blood or some traces of the deceased body had been present anywhere in the vehicle. If such evidence was presented before Court, the crown's arguments would have been persuasive. As it is, there is no iota of evidence, other than the oral testimony of PW1, PW2 and PW3, which itself has been shown to be unreliable. How can this Court then make a finding of fact, that indeed the accused was bundled into the car boot, when there is no compelling evidence pointing in that direction. The *causal nexus* between the factual cause of death and the

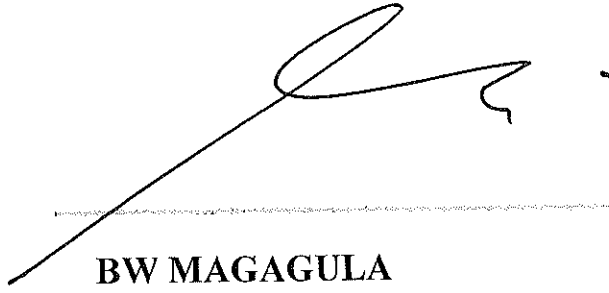
accused persons before court is not there. There is a void in the evidence between the last time the deceased was seen and the time in which he was found dead next to the road.

[74] The Accused, I admit to have administered to the deceased in an effort to take him to the police station. Without condoning such a blatant assault, the Accused persons are before court facing a charge of murder. I completely, agree with the Crown's submission that it is not every provocation that entitles an Accused to resort to any form of violence. The Crown is also correct in its submissions that the Accused persons had an alternative, to take the deceased to the police station without assaulting him. But, the issue does not end there. The Accused are charged with murder, it is the elements of murder that have not been proved by the Crown. The position of the law is clear, that no onus rest on the Accused to convince the court of his innocence. The Crown bears the onus to prove his guilt throughout a criminal trial. See **Rex v Difford 1937 AD 370**.

[75] It is therefore the conclusion of the court that, due to the reasons as aforesaid, the Crown has not been able to prove its case beyond reasonable doubt against the Accused persons. In the circumstances, I am not inclined to convict both Accused persons on the charge of murder.

ORDER

The Accused persons are acquitted.



BW MAGAGULA

JUDGE OF THE HIGH COURT OF ESWATINI

For the Crown:

Miss Ngubeni (Prosecuting Counsel DPP)

For the Accused:

Mr B. Xaba (Xaba Attorneys)