**IN THE SUPREME COURT OF SWAZILAND**

**JUDGMENT**

Criminal Appeal Case No. 41/2012

In the matter between:

**NTOKOZO MALINGA** **Appellant**

**vs**

**REX** **Respondent**

**Neutral citation**: **Ntokozo Malinga vs Rex *(41/2012) [2016] [SZSC] 54 (30 June 2016)***

**Coram:** **K. M. NXUMAALO AJA**
**C. MAPHANGA AJA**
**M. J. MANZINI AJA**

**Heard:** **12th May, 2016**
**Delivered:** **30th June, 2016**

**Summary:** *Criminal Appeal – murder and robbery – appeal against conviction and sentence – circumstantial evidence – doctrine of common purpose invoked mens rea in the form of dolus eventualis - applicable rules and principle – prior agreement and active association established – intention inferable from circumstance – Appeal dismissed – conviction and sentence confirmed.*

## JUDGMENT

**MAPHANGA AJA**

[1] The Appellant and his co-accused one Mxolisi Nkambule appeared before the High Court on a charge of murder and robbery. They were convicted by the trial court on both counts and were each sentenced to a term of imprisonment of 26 and eight years on the murder and robbery counts respectively. The sentences were to run consecutively and in the case of the Appellant his term of imprisonment was backdated to the 12th July, 2012, the date of his arrest. The High Court judgment was delivered on the 12th October, 2012.

[2] The Appellant appeals against both the convition and sentence.

[3] Incidentally in May 2014 the Appellant's co-accused filed an appeal beforethis court against the sentence only -and not the conviction. That appeal was heard by this court and in the judgment of **Dr. S. Twum** delivered on the 30th May 2014 when it was was dismissed.

**The Charges**

[4] In terms of the indictment it was alleged that on or about the 22nd July 2010 and at Mathendele Township in the Shiselweni region, the two accused, acting with a common purpose, unlawfully and intentionally killed Sifiso Mndzebele and thereby committed the crime of murder.

[5] The second count of robbery detailed that on the 22nd July 2010 the accused, again acting jointly and in furtherance of a common purpose intentionally and

unlawfully assaulted the deceased and in so doing through the use force and violence intended to induce submission, thereby did take and steal from him certain items of property being a silver grey VW motor vehicle, a cellular phone unit and cash in the sum of E400.00

[6] The Appellant presently entered a plea of not guilty to both counts.

[7] Barring the testimony of DW1 a defence witness called by the Appellant (2nd accused) who was with the deceased at the time of the commission of the offence and who gave the only direct account of the events surrounding the attack and assault in the robbery, the trial court largely relied on circumstantial evidence derived *inter alia* from the testimony of various Crown witnesses who appeared as PW1, PW2 AND PW3.

[8] It bears noting further that both accused persons elected to lead evidence in chief with the Appellant (as indicated earlier calling a further witness DW2 in his defence). They both implicated each other – each pointing to the other as the one who stabbed the deceased. The Appellant also called DW2 as a defence witness.

[9] Apart from this conflicting evidence, there was no direct evidence attributing the inflction of actual fatal blow specifically to either accused made the element of common purpose germane in the evaluation of the Crown's case. None of the witnesses called actually witnessed the stabbing of the deceased.

[10] It bears mentioning also that there was no evidence before the court that either of the accused had the intention to kill the deceased with the Crown seeking to rely on the evidence led to infer the existence of *dolus eventualis*.

[11] The Court *a quo* in the judgement gave a detailed and comprehensive analysis of the evidence led before the court

[12] It is therefore unnecessary to reproduce the full facts or to again recite the evidence led before the trial court save to give a brief summary of the established facts and to highlight key salient featuresin light of the issues surfaced by the grounds of appeal presently.

*Brief background*

[13] The events giving rise to the matter all occurred in the night of the 22nd July 2012 around 23h00 when the deceased, Sifiso Mndzebele whilst in the company of a woman, one Ncami Khumalo, drove his vehicle (a silver grey VW car) to a place called Mamkhulu's Bar in Mathendele township. In a bizarre and ironic twist to the tale, his companion who described the deceased as her 'boyfriend for two years' was to testify as a defence witness (DW2) for the Appellant. The deceased found the bar open with certain persons drinking there. He parked and called one of the men he found there, Nkosinathi Simelane (PW1) gave him money to buy cigarettes for him from the bar. PW1 told the court he together with the accused persons (Mxolisi Khehla Nkambule, Ntokozo Malinga) and other revellers including Wandile Nkonyane, Logwaja Dlamini and Sunboy Mamba had gathered there drinking.

[14] It emerged in the course of the evidence that no sooner had the deceased sent PW1 on the errand than he was seen staggering towards the bar clutching his chest. This account is confirmed by PW1 and PW3, Wandile Nkonyane whose testimony on the circumstances of the deceased's arrival were similar. The deceased reported to the patrons that he had just been stabbed and robbed of his vehicle. The assailants had apparently made off with the vehicle but it had fallen into a ditch and had got bogged down. It was found stuck nearby by some of the revellers who responded to the deceased's hue and cry.

[15] Efforts to get the deceased to hospital in good time were delayed although he was eventually taken there by his friends. He succumbed to his injuries and died a few days afterwards.

[16] No medical evidence was was led. The cause of death was not in issue. The court received into the body of evidence a postmoterm report of the deceased which was admitted by consent as Exhibit 1. From that report the cause of death was stated as a **'3 ½ stab wound on the middle portion of the front and left side of the chest".** Thus far the facts were common cause.

[17] To prove its case the Crown largely relied on circumstantial evidence drawn from the testimonies of various Crown witnesses PW1, PW2 and PW3 who gave various accounts of the circumstances and events concerned in the trial.

[18] The accused both elected to lead evidence in chief and in the case of the Appellant, as indicated he also called as defence witness Ncami Khumalo, DW2, the woman who had been the deceased's companion in the motor

vehicle that fateful night. From her testimony emerged evidence that was in the main not favourable to or exculpatory of the Appellant.

[19] In all, given the unique circumstances of the case and the nature of the body of evidence relied on, the absence of direct proof pointing to a causal contribution to the crime directly attributable to the accused as to their specific roles in the commission of the crime, the Crown sought to rely on ‘common purpose’ as basis for assigning the respective culpability of the accused to the commission of the crimes.

[20] Another thematic feature of the proof relied on by the Crown for its case is that it is founded largely on circumstantial evidence and therefore brings to the fore in this appeal the application of the rules guiding reasoning by inferences drawn from circumstantial evidence as basis for a convitions. To this I shall return further herein.

The Grounds of Appeal

*Preliminary issues*

[21] At the start of the proceedings Mr Mabila raised certain oral arguments on the basis of certain preliminary concerns of the Appellant regarding shortcomings in the record. Although in the final analysis the Appellant did not press on with these allegations it is necessary to address them in so far as it was suggested and alleged in some respects that the state of the record was prejudicial to the appellant’s proper prosecution of this appeal. Mr Mabila’s main contention in this regard was that the record was inadequate and did not bear out in fullness what transpired during the course of the Appellants trial.

[22] As conventional practice and in keeping with the rules it is left to the parties legal representatives in liaison with the Registrar, to ensure that a comprehensive record is compiled. Where necessary their resources are called upon to seek a satisfactory reconstruction of such record to the best of their ability. Such has been the practice in the past. (see **Celani Maponi Ngubane and Two Others vs Rex Criminal Appeal No. 6/06).**

[23] In this case it is assured that in light of the Registrar's ratification to the integrity of the record as reflected the same to be satisfactory and reliable, the process was followed and observed.

[24] Mr. Mabila's chief concern as contended in the Appellant's Heads of argument is that the record is inadequate and attributes this to a failure in the recording system. The record has had to be reconstructed. His assertion in oral argument was that this was done without the imput of the accused's counsel and relied mainlyon notes of the learned **trial judge**. Reservations are expressed as to the reliability of the record on account of this assertion alone. As an example of the shortcomings in the record, he cites the absence of any indication in the record as to whether the accused persons had closed their respective cases before the parties made their respective submissions.

[25] Secondly he argued that the record is not satisfactory in that it cannot be determined in view of what he alleges is incompleteness of the Appellants submissions. On these basis he intends that an injustice is likely to be occasioned his client as it the state of the record gives rise to an impression that the Appellant was not afforded an opportunity to make his submissions.

[26] The court has heard the opposing contentions of Mr. Dlamini for the Respondent and is satisfied that much of the misunderstanding in the conduct of compiling the record could arise from the fact that the Appellants representatives did change with Mr Mabila coming to the picture much later in the day. It seems there may have been a lost opportunity.

[27] Whether in the circumstances any material objections to the completeness of the record can be found, me one guided by the dictum of the court in **Celani Maponi and Others vs Rex Criminal Appeal Case No. 6/2002** where it is stated that:

> **"----- the mere fact that a record is defective does not ipso facto have to result in the acquittal of the Appellant. It depends on the defects and whether or not it is reasonable to rely on the record as it stands to warrant a finding that it provides sufficient evidence on which to base a verdict on may of the other."**

[28] As regards the question concerning the completeness of the record in regard to the Appellant's submissions the one aspect that has been brought to our attention in this regard. This is the significance of the document which appears under the titled "2nd Accused's closing submissions" that document bears what appears to be a signature and date at the end of the text.

[29] The Appellant suggestion that the record is inadequate for wait if completeness in the accused's submission is difficult to support in light of the above document in the record.

[30] Ultimately the question we have to address in relation to Mr. Mabila's preliminary point is whether the state of the record has been shown to be inadequate as to give rise to a conclusion that **"in relation to some if not all the counts on the which the (Appellant) was convicted ..... is insufficiently comprehensive for justice to be done" in this case"** to use the test in the **Maponi** case.

[31] There seems little doubt that the record has aspects where the transcription has certain gaps as have been pointed out, and that some of the transcription of the testimony seems garbled and default to follow and that there seems to be some gaps in some passages. However it is not unconceivable that such errors or defects will rise from time to tome in the transcription of evidence.

[32] These defects should not detract from the adequacy or integrity of the record to the degree of sufficiency to provide some rational basis to this courts decision in the determination of this appeal. For this reason whilst Mr Mabila's concerns are noted and this Court is mindful of the paucity of the record in some respects, it is recognised that the reconstructed record does provide an adequate basic backdrop for the consideration of this appeal. Where it falls short due regard will be given to the shortcomings in the matter. Mr Mabila conceded this position at the face of submissions in rebuttal by Mr S Dlamini of Mr Mabila's preliminary points, and went on to argue the main heads of appeal.

*Main Grounds*

[33] On the main grounds of appeal Mr Mabila has advanced various contentions by way of written and oral submissions. Chiefly he urged that the trial Court had wrongly convicted the accused in that it misdirected itself in making findings of fact based on circumstantial evidence without adhering to the established rules of reasoning by inference. Linked to this he contended that the Court had

also erred by convicting the Appellant on the basis of insufficient and contradictory evidence in the Crown's case. In a word the Court urged the Appellant had been led into error in accepting the Crowns case even though it was wanting in material respects and did not meet the level of proving the appellant's guilt beyond reasonable doubt. Further it was contended on behalf of the Appellant that the trial court had misconceived or did not properly consider and apply doctrine of common purpose in a number of key respects in particular the determination that the appellant's *mens rea* in the commission of the alleged offences had been proven. Specifically, Mr Mabila also argued that the trial court had misdirected in one further respect: in not properly evaluating the evidence of the various Crown witnesses in regard to the Appellant, separately and individually as it was obliged to do in adjudicating the guilt of the appellant. Finally it was contended that the trial court had misdirected itself in its treatment of the evidence of the defence and in obliquely importing or supposing an onus to prove innocence on the Appellant. Almost invariably all the grounds of appeal are directed at the conviction on the murder and not the robbery charge.

[34] Given that a key element to this case is that there was no direct evidence led as to who inflicted the mortal injury on the deceased, it was contended by the Appellant's Counsel before us that where the Crown sought to rely on circumstantial evidence proper regard should have been had to the rule in **R v Bloom 1939 AD 188** to the effect that the two rules affecting reasoning by inference that are imperative. These are:

a) **That the inference sought to be drawn must be consistent with all the proven facts and if not it cannot be drawn; and**

b) **The inference must be the only reasonable inference that can be drawn from the proven facts ( or must exclude every reasonable inference save that which is sought to be drawn).**

[35] In the case of **Nhlanhla Charles Moratele and Another v Rex Criminal Appeal Case No. 11/2001** the Court has stated that in the treatment and analysis of circumstantial evidence the ultimate test is whether the effect of the evidence, taken cumulatively, leads to a finding the guilt of the accused person has been proven beyond reasonable doubt. (See also **the restatement of the principle in Beck JA's remarks in Sean Blignaut v Rex Criminal Appeal Case No. 1/2003 to equal effect).**

[36] In the context at hand a useful approach would seek to answer to the question whether on the evidence led before the Court *a quo* a reasonable or probative hypothesis pointing to the innocence of the accusedcould have been drawn that would impute the cause of death of the deceased to another person other than either the co-accused, such inference being demonstrably probable in the circumstances of the case.

[37] This inevitably calls for the analysis of the critical evidence that was led before the Court. Most of the evidence on which the Crown case depended turned on testimony that tended to associate the both accused (albeit acting in concert) by placing or locating them both, in time and sequence of events as it is in proximity to the scene of the crime. I say most because as regards the commission of the robbery, DW2 supplied the most direct evidence of the participation and association of the accused persons in the joint mission of the robbery. Her evidence both in chief and upon cross-examination identifies the Appellant and the 1st Accused as 'two' men who approached, violently forced and subdued her and the deceased from either side of the motor vehicle into giving up the vehicle and the other items of property. From her evidence as corroborated in the material respects by the Crown witnesses PW1-3 the accused were actively linked to the commission of the robbery against the deceased. She also told the Court that both the Accused persons were armed

with knives and from her evidence it emerged that she was in the processed petrified by the attack.

[38] The only element in her evidence that seems out of place and incoherent with her overall evidence comes in her mention of a third person amongst the men she says attacked her and the deceased. It seems however that although the court does advert to this aspect in the narration of her evidence in the judgment, it is clear that the Court was not impressed with her testimony in this regad and thus diregarded or rejected this aspect and concluded that it was either of the two accused acting with a common purpose who carried out the robbery and by inference who stabbed the deceased.

[39] DW2's evidence as to the relative roles played by the accused persons especially in regard to their handling, control and driving of the deceased's vehicle after the robbery is corroborated by the Crown witnesses PW1, PW2 and PW3 who all identified Appellant and the 1st Accused as the two men who were in occupation of the deceased's motor vehicle and with whom the various witnesses had an encounter near the crime scene and around the deceaseds vehicle. None of these witnesses mention the presence of a third man.

[40] The Appellant himself, in his own version where he sought to implicate the 1st Accused, makes no mention of another man. DW2 in her account was unable to explain what happened to the third man. Her identification of the Appellant as one of the assailants in the robbery, and her evidence about the other person who was the accomplice of the Appellant and her description of how the man who took over the drivers seat of the vehicle and drove the deceased vehicle is consistent with and corroborates the evidence of PW1, 2 and 3 who, as stated

earlier, positively identified Accused No.1 as the other person who was with the Appellant and who was in control of the deceaseds vehicle.

[41] Weighing the probabilities there was no evidence on the whole to support a hypothesis that could reasonably point to the possibility of another person having attacked and stabbed the deceased as suggested by DW2's evidence. This must be seen in the context of the evidence of PW1 and PW3 who both say immediately prior to the robbery and the stabbing of the deceased they were with the both accused persons drinking at the bar. PW1 told the Court *a quo* he saw Accused Nos 1 together with the Appellant approach the deceased's vehicle immediately prior to the robbery. No other person was with them. The next time PW1 was to see them they were both in the deceased's vehicle in the aftermath of the robbery.

[42] PW 3 also says he found Accused No. 1 and others drinking at Mamkhulu's Bar when he joined them. He told the court that hardly 15 minutes had passed after his arrival when as he was standing with PW1 when he saw the deceased approach them and reported he had just been stabbed and robbed of his car. Consistent with the evidence of PW1 and PW2, he told the court of how, at the heat of the moment, he and PW1 had pursued the deceased's motor vehicle, alerted as it were to it by a loud noise emanating from where the deceaseds car had got stuck nearby. He states that upon reaching the vehicle they found the accused pesons (the Appellant and his co-accused) in the vehicle. Again PW3 makes no mention of another man or person other than the accused persons in the vehicle in question. These circumstances rule out an inference of some other person having been responsible for the robbery or stabbing the deceased in the unfolding scenario as described in the evidence as a whole.

[43] In the circumstances the learned trial judge seems to have convicted the appellant and his co-accused on the strength of the evidence and the inferences as to the appellant's participation as one of the perpetrators of the crime drawn from the evidence linking him and his co-accused to the robbery, such being the only reasonable inference to be drawnconsistent with the evidence placed before the trial court.

[44] The Appellant also did himself no favours when he called DW2 a defence witness. Her evidence largely only had the effect of implicating the appellant to the commission of the robbery and went a long way to corroborate the evidence of the Crown witnesses in associating the accused persons with the commission of the offence.

*Common purpose*

[45] Turning to the common purpose theory and based on the totality of the evidence the trial court also found correctly that there was sufficient evidence on the basis of which it could make a finding of an association of the Appellant with the first accused in the commission of the crime on the weight of the evidence before the court which overwhelmingly pointed to an active connection of the Appellant to his co-accused in their conduct and actions as to give rise to the a conclusion that they were acting in concert in pusuit of a common mission.

[46] This court in the words of **Tebbutt JA** in **Phillip Wagawaga Ngcamphalala and Others v Rex Criminal Appeal Case No. 17/2002** identifies the definitive elements of 'common purpose' as being **firstly** the physical and vicarious factor of an 'association of two or more persons in a joint unlawful enterprise; each thereby being responsible for any acts of his fellows which fall

within their common design or object' and **secondly** the mental element of a common intent to assist one another in committing an offence; which can take the form of a shared specific purpose arising by prior agreement or spontaneously to assist one another in committing the offence. In this instance it would be either to commit the robbery or the murder.In that case the learned **Tebbutt JA** stresses the point that for the requirements of common purpose to be found there need not be proof that there existed a prior conspiracy or premeditated motive to commit the crime on the part of the accused persons.

[47] On the first part of the test the Court had no hesitation in finding correctly in my view, that there was active association in deeds as between the accused persons in that the evidence shows that they acted together in attacking the deceased, but they assisted each other in a series of activities prior to, during and after the robbery in confronting the deceased and his companion, subduing them violently and dispossesing them of their property but in also retention of the spoils of the robbery through their control and occupation of the vehicle. I agree with the conclusion of the Court a quo that not only does the evidence place them a the scene, but it also shows their actual participation together in the perpetration of the attack on the deceased. At some point when it seemed clear they had come to the end of their tether and one of the deceaseds friends had taken away the car keys they fled and abandoned the deceaeds motor vehicle to escape the crime scene.

[48] It was argued by Mr Mabila that although the facts and analysis thereof showed that the Appellant and the co-accused were both present at the scene of the crime, there was no evidence that the Appellant was in possession of a knife but rather that it was Accused No.1 who was carrying a knife on that night. I have difficulty following what value this argument bears for the Appellant. Firstly on the evidence of DW2 a witness called by the Appellant, it was

establhished during her cross-examination that the Appellant had told the witness he was carrying the 'all the knives including the one used to stab the deceased'. Also she told the court that she had been scared of the Appellant because he was carrying a knife which he used to threaten her. This evidence was unearthed by the Appellants own counsel in the re-examinatio of his own witness and the evidence was not challenged. Secondly even if the weapon was only attributed to the first accused this scarcely exculpates the Appellant on account of the application of the common purpose doctrine. There was thus a strong inference arising from the established facts that the Appellant and his co-accused were the robbers who robbed and assaulted the deceased.

[49] For the second element of mens rea or intention to be proved in cases of common purpose, it has been stated in the case of **Phillip Wagawaga v Rex** as follows:

> **"…(t)he accused must have had the requisite mens rea; so, in respect of the killing of he deceased, he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue."**
>
> **"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 and either participated therein or agreed, by words or conduct to associate himself with the act or acts of his associates"**

[50] Seizing on the absence of evidence directly linking either of the Appellant with the lethal assault of the deceased or evidence pointing to a causal contribution by the appellant to the mortal injury of the deceased, Mr Mabila suggested that the only basis of an allegation of the association between the appellant and his-co accused was that he had been present at the scene of the crime but argued that 'mere' presence was not enough. I find this argument without factual

foundation as there is ample evidence especially through the testimony of DW2 that the Appellant was an active participant in the robbery not to mention his association with the first accused in a series of activities when they both dealt with the deceased's motor vehicle after the alleged robbery and stabbing of the deceased.

[52] The Court *a quo* was mindful of the leading authorities on the correct legal principles cominng into play in the evaluation of evidence to satisfy the doctrine of common purpose for the learned trial judge adverts to the requirements in **Safatsa** as elaborated on in **Mgedezi (supra).**

ANALYSIS OF THE EVIDENCE BY THE COURT

[53] The Crown relied on evidence of three key witnesses in building its case against the accused persons. These were PW1, PW2 and PW3. The critical aspects of PW1's account lie in his account where he mentions that he saw the two accused persons walk towards the deceased's vehicle. He clearly identified them because he says they walked past him as he going towards the bar from the deceaseds vehicle in his errand to by cigarettes for the latter.

[54] A significant element in PW1's evidence is the closeness both in time and place of the location of the Appellant and his co-accused to the events around the crime scene that bear consideration. It was his evidence that it was shortly after meeting the two when as he was attending to buying cigarettes for the deceased when the latter came running clutching his chest and raised a hue and cry that he had just been robbed of his vehicle and had been stabbed. It was there and then that PW1 realised that indeed the vehicle was gone. He also noticed that the Appellant and the 1st Accused were nowhere to be seen.

[55] PW1 says he tried to assist the deceased but the latter was too weak and collapsed before long. His attention was immediately drawn by the din of the deceased's vehicle which appeared to be stuck nearby. It was at that point in timethat he next saw the Appellant with the 1st Accused trying to dislodge the vehicle where it had got stuck in a ditch.

[56] There must have been quite a commotion around the vehicle; what with the effort to take out the vehicle from the ditch which attracted local residents. Simelane says he was one in a party of people who attempted the rescue together with certain friends of the deceased. According to PW1 one of the people who attended the scene was a girlfriend of the deceased was Xohle Mhlanga (who later testified as PW2). From the evidence it was Xolile Mhlanga who, on enquiring about the deceaseds whereabouts was told by the accused persons that he was in the vehicle but discovered that the deceased was not there. Mhlanga leraned the deceased had been stabbed and immediately sent for her brother, Themba Mhlanga to help.

[57] From the evidence of PW1 it was established that shortly after the incident of the deceased's stabbing and robbery, the only persons who were found in possession and control of the deceased's motor vehicle were the Appellant and the 1st Accused. On the evidence of PW1 and other crown witnesses PW2 and PW3 as well as that of DW2 (the only 'independent' defence witness called by the Appellant) by all accounts the evidence shows the two acted in association at all material times and had been actively linked as the occupants of the vehicle in the activities involving the removal of the vehicle from the ditch and had driven the vehicle off thereafter back to the bar.

[58] PW2 largely confirmed the testimony and PW1 in identifying and linking the Appellant and 1st Accused with the possession and control of the deceases motor vehicle. In her testimony she had been drawn by the noise of the deceased's vehicle as the effort to remove it from where it was stuck was ongoing and she identified the Appellant as one of occupants of the vehicle when she arrived at the point where it was. She also places the 1st Accused and the Appellant at the scene and testified that she found them trying to remove the car radio of the deceased's vehicle with a knife. She was threatened by the accused persons when she tried to intercede. She left the vehicle to attend to the deceased where he lay near the pub. She describes the distance as being some 3 homesteads away from where the vehicle was. She had to send for her brother in a frantic effort to assist the deceased who was now weaker and bleeding profusely.

[59] She related to the court how as she and her brother Themba Mhlanga rushed to attend to the deceased Themba Mhlanga confronted the accused who were still in the deceased's car but had by then succesfully dislodged it. The 1st Accused was trying to drive off in the deceased vehicle. It was her evidence that Themba Mhlanga tried to stop the car but the 1st Accused attempted to run him over with the motor vehicle.

[60] The Appellant and the 1st Accused drove the vehicle ahead of PW2 and Mhlanga to the vicinity of the bar where the deceased was. She concludes her account by again confirming that when they arrived at the bar again the Appellant and the 1st Accused still occupying the front passenger and driver seats respectively. This time they found the deceased had been placed inside the vehicle.

[61] PW2 also told the trial Court that the 1st Accused still in the company of the Appellant was again very aggressive when PW2's brother Themba Mhlanga attempted to disposses them of the vehicle by threatening him with a knife. Non-plussed Mhlanga succeeded in thwarting the accused's attempt to make off with the deceaseds car by switching off the ignition and taking away the car keys.

[62] It is at that point that both the accused eventually jumped off the vehicle and fled the scene. By all these accounts and the established evidence as led before and accepted by the trial it was clear that both the accused persons had at all material times acted in close and active association in the activities and events where in they had been placed by the various witnesses.

[63] In the analysis of the evidence concerning the unfolding events the trial Court accepted that there had been active association and link between the appellant and his co-accused. That association had in the totality of the evidence, been established and traced from the vicinity of the crime scene as the last persons seen approaching the deceased's motor vehicle to the possession and control of the deceased motor vehicle immediately after the stabbing and robbery and throughout the transactions as related by the various witnesses to the Court. The Appellant and his co-accused according to the evidence remained acting jointly remained in occupation and control of the vehicle to the point when they eventually fled.

[64] It is the testimony of the deceased's girlfriend who, in a bizarre twist of irony was called as a defence witness (DW1) by the appellant, that introduced the most adverse evidence is given against the Appellant. It was her evidence that she and the deceased had barely driven to and parked at the Mamkhulu Bar that

fateful night, when they were attacked by certain men two of whom were armed with knives.

[65] At different points of her testimony it emerged that two of the assailants who succeeded in robbing her and the boyfriend of the car and other possessions were both armed with knives. Although initially in her evidence in chief she mentioned that "one" of the men produced a knife, she stated upon examination by the court that the Appellant had been carrying knives. Her testimony was to firmly place at the scene of the crime as the second assailant the 1st bearing the one who confronted the deceased, opened his door during the robbery.

[66] As indicated earlier her evidence was subtantially corroborated by evidence of Crown witnesses PW1 and PW3.

[67] The common thread of the evidence of the various witnesses is that the Appellant and the Accused number one were identified as the persons who were seen around the crime scene immediately after the robbery and attack on the deceased.

[68] DW2 also confirmed that the two were at all times acting in concert in that they actively acted in a co-ordinated manner and assisted each other. There is sufficient evidence that the two participated and perpetrated the violent act of robbery on the deceased.

[69] There was however no direct evidence led at the trial court as to who stabled the deceased.

[70] DW2 the most well placed person who had been with the deceased at the time of robbery told the trial court repeatedly that she was not aware the deceased had got stabbed. She did however confirm that the deceased had managed to escape from the vehicle and run away from the scene as the the Appellant and his co-ccused were struggling to start the deceased's motor vehicle.

[71] It may reasonably inferred that the deceased could only have been stabbed during the robbery as by all accounts of the crown witnesses, he emerged from the scene running towards the bar already clutching his chest in a desperate cry for attention and help announcing that he had been stabbed, the stab wound clearly in evidence to all.

[72] Both the accused in their evidence in chief implicated one another – the one pointing to the other as the one who stabled the deceased. It was conceded by Mr Dlamini for the crown that ordinarily such evidence has to be treated with circumspection.

[73] Self preservation being the driving force behind such evidence its reliability calls it into question. Be that as it may. I am persuaded by the Respondent's contentions on the strength of the Heads of Arguments as supported by the dictum of the learned Leon PJ in **Nhlanhla Charles Moratele and Another vs Rex Appeal Case No. 11/2002,** that where common purpose can be proven as an element of the crown's case on the charges preferred against the accused, it is not necessary to prove who among the accused struck the mortal blow. That leaves the question whether the requisite *mens rea* has been established by the crown through the evidence.

[74] It is totality f the evidence derived cumulatively from the testimonies of DW2, PW1, PW2 and PW3 that is sufficiently compelling in linking the Appellant and his co-accused in active association, to the fatal assault, the robbery and the spoils of the offence – the motor vehicle of the deceased.

[75] None of the witnesses witnessed the actual actually stabbing and in this regard the proof has to be circumstantial. What tips the scale in the critical mass has to be DW1 evidence on the basis to which the trial court concluded by inference that it was either one of the accused acting in common purpose with the other, who carried out the attack.

[76] From the record there are some aspects of DW2's evidence that are questionable in so for as they are inconsistent with those of PW1, PW2 and PW3 and in some respects somewhat garbled and incoherent. For an example her testimony in regard to the actions of the two key figures who mounted and carried out the robbery and for a while held DW2 and the deceased hostage after forcing them from the front passenger and driver seats respectively, is consistent with the crown witnesses account. Linking the driving and control of the vehicle in the stabling aftermath to the Appellant and Nkambule (1st Accused).

[77] She is the only witness who makes reference to the existence of a third man amongst the persons who carried out the robbery. Her evidence as to the role and what became of the third man is at best vague and confused. Most importantly her evidence later only refers to and is confined to'two men'; the appellant being one of those men. Her evidence leaves a gap as to what became of the third figure. In that regard DW1 only has this to say:

**"the motor vehicle eventually started and we left. The two men and myself. I do not know where the third man went. The motor vehicle drove fast and got stuck in the ditch, I was seated at the back seat."** (sic).

**Conclusions**

[78] Critically the trial court found that DW2 evidence was largely consistent with that of PW1 – PW3 in that they corroborate each other in most respects including their account that it was the 1st Accused in the company of the Appellant – who was driving the car to the point when it fell into a ditch and afterwards once it had been disclosed. They were the only occupants in the vehicle.

[79] DWl's placement of the two at the scene of the crime is also consistent with PW1's evidence with PW1's evidence that it was again the two who met passed him walking towards the deceased's car prior to the emergence of the deceased with the stab wound.

[80] It is clear that although in inference to DW1's testimony the court seems to acknowledge her mention of a third assailant, in the final conclusion the trial court however seems to have rejected that aspect of her testimony. In so doing and for the reasons above we are of the respectful view that the court analysis cannot be faulted in light of the evidence.

***Common purpose – The Legal Principles***

[81] In this appeal one of the grounds on the basis of which the trial court's judgment is being challenged is that the learned trial judge wrongly applied the doctrine of common purpose to the facts of the case in as much as this ground

is closely allied to the general contention that the court also misdirected itself in regard to the factual findings on which doctrine was applied. It's a compound legal argument linked to issues of analysis of the evidence overall in that sense.

[82] Common purpose is a doctrine that is often difficult in application due to the various key requirements that must be established to ground a finding of guilt on the part of an accused person. It is therefore important to set out the applicable principles.

[83] The learned author Jonathan Burchell, in *Principles of Criminal Law* at 574, explains common purpose in the following terms:

> **'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 number which falls within their common design.**"

[84] It is a legal construct borne out of a recognition of the difficulty of proving the causal contribution by any one in a number of persons acting as associates in the commission of a crime. The courts have evolved a set of pre-requisites for establishing common purpose. The leading cases on the subject are **S v Safatsa and Others 1988(1) SA 868 (AD); S v Mgedezi and Others 1989(1) SA (687) AD; Mongi Dlamini v Rex SZSC Criminal Appeal Case No. 2/2010.**

[85] In **S v Thebus and Another 2003 (2) SACR 319 (CC)** the reasoning and essence of the concept is stated clearly by **Moseneke J** when he says:

**"In our law, or ordinarily, in a consequence crime, a causal nexus between the conduct of an accused and the criminal consequences is a pre-requisite for criminal liability. The doctrine of common purpose dispenses with the causation requirement. Provided the accused actively associated with the conduct of the perpetrators in the group that caused the death and had the required intention in respect of the unlawful consequences, the accused would be guilty of the offence. The principal object of the doctrine of common purpose is to criminalise collective criminal conduct and thus to satisfy the social 'need to control crime committed in the joint enterprises'. The phenomenon of serious crimes committed by collective individuals acting in concert, remains a significant societal scourge. In consequence crimes such as murder, robbery, malicious damage to property and arson, it is often difficult to prove that the act of each person or a particular person in the group contributed causally to the criminal result. Such a causal pre-requisite for liability would render nugatory and ineffectual the object of the criminal norm of common purpose and make prosecution of collaborative criminal enterprise intractable and ineffectual."**

[65] In this case the central axis of the Crown's case against the accused persons in regard to both charges of murder and robbery is that the Appellant and the 1st Accused were acting jointly in furtherance of a common purpose.

[87] The imputation or assignment of culpability to the individual for the collective conduct and wrongs is at the heart of the construct of common purpose. In **Phillip Wagawaga Ngcamphalala and Others v Rex, Tebbutt JA** gives further insight as to the core elements of the doctrine as follows:

**"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 (see the judgement in the South African case of S vs Sefatsa 1988 (1) SA 868 (AD), which has been followed in several cases in this Court e.g. Patrick Wonderboy Ngwenya v Rex Cr. App 25/1999. See also S v Mgedezi and Others 1989 (1) SA 687 (A). The crucial requirement is that the persons must all have the intention to commit the offence- *in casu* to murder and to assist one another in committing the murder and to set alight and burn down the houses of the targeted victims. 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 (See S v Shezi 1948 (2) SA 119 (AD) at 128; S v Trosane 1951 (3) SA 405 (0) at 407; S v Nhiri 1976 (2) SA 789 (RAD) at 791).”**

[88] The test for determining whether the essential elements of common purpose have been established in any given factual situation were conveniently crystallised in the **Mgedezi** case (supra) as follows:

**“In the absence of proof of a prior agreement, an accused who was not shown to have contributed causally to the killing or wounding of the victims…… can be held liable for those events on the basis of the decision in S v Safatsa …….only if certain pre-requisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault of the victims. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, the requisite** *mens rea***; so, in in respect of the killing of the deceased, he must have intended them to be killed or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue”.**

[89] Based on this approach unless there is prior agreement or an act of association (active association) attributable to the accused in a criminal object, is a necessary condition that must exist in the imputation of liability on a person on the basis of common purpose.

[90] In terms of this test either prior agreement or proof of an act of active association has to be shown to have existed for an imputation of guilt by association to be possible.

[91] Turning to this case, the trial court took the view that prior agreement had been proven on the available evidence. In view of the fact that there was no direct evidence before the court that the appellant and his co-accused had conspired and planned to stage the robbery and to kill the deceased, the trial court would have had to infer this from the available evidence. There was no direct evidence led on the basis of which an inference of prior agreement in the sense of a plan to carry out the robbery and to injure or kill the deceased.

[92] That proof of prior agreement may be inferable from the circumstances will depend on the circumstance of each case. As Burchell and Hunt succinctly puts it:

> "**Proof, whether by evidence of words or conduct, of agreement to participate in the criminal design, added to proof of participation, and directly or by necessary implication of contemplation of (possible) consequences, irrespective of the particular means by which they are attained (coupled with recklessness as to whether those consequences occur or not) provides the proper test in law of the liability of parties to a common purpose."**

[93] It is therefore not necessary to show that there was a plan or scheme or conspiracy to commit a crime as it is conceivable for common purpose to arise in circumstances where the parties concerned either act spontaneously or form the shared intention to undertake a criminal act immediately prior to the act. The spontaneity may take the form of some immediately hatched decision, formed even minutes prior to the act to carry out whatever criminal activity.

[94] In this regard the learned trial Judge in finding that prior agreement had been established had to say:

> "**The evidence shows the existence of a prior agreement by the accused to commit the offences. When the motor vehicle was parked next to the bar, they confronted the deceased, stabbed him and robbed him of his car. In addition they actively associated themselves in the commission of the offence; not only did they attach the deceased together, assisted each other in bungling DW1 and the deceased at the backseat, took their money and cellphones as well as the motor vehicle. The requisite mens rea for committing the offences is present in respect of both accused"**

[95] In is clear that this conclusion is reached by inference from the conduct on the part of the deceased suggesting a common design through their association and co-ordination in their activities when carrying out specific acts in the commission of the crime. That is how I understand the finding to have been reached by the Court. From the evidence in the record however it is clear that there was no direct evidence led to show that the accused had hatched a plan to commit the offence however as indicated such agreement although inferable from the circumstances it is not necessary to do so in line with the test in Sefatsa.

[96] What is material is whether on a proper application of the principles to the facts in line with the Safatsa test, necessary pre-requisites set out therein can be said to have been met by the Crown in this case.

*Presence at the scene*

[97] There is common thread in the evidence led by the Crown through the various witnesses PW1, PW2, PW3 and even the only independent defence witness DW2, which firmly places both accused at or in close proximity to the scene of the crime. They were the last persons seen walking towards and approaching the deceased's car as he waited there parked. They are positively identified through the various witness accounts as the two persons who almost continually remained in occupation of and in control of the deceased motor vehicle in various stages and transactions as the scene unfolded right from the time immediately prior to the stabbing and the robbery as reported by the deceased to when the accused finally abandoned the vehicle and fled once they had been dispossessed of the key to the vehicle by Themba Mhlanga a friend of the deceased.

[98] In the finale of the dramatic events around the deceased motor vehicle, the evidence shows that both the Appellant and the first accused had returned to the deceased at Mamkhulu bar. Both PW1 and PW3 told the court that after the two had managed to dislodge the vehicle from where it had got stuck they had driven it to the bar. That is where they were found by the Crown witnesses still inside the car- the difference being that this time the deceased had been placed inside the vehicle.

[99] From this evidence it is clear that the two must have been aware of the deceased and his condition.

[100] Theirs was no mere presence for they were major actors as a posse in the activities they came to be associated with by the various witnesses.

*Awareness of the assault/robbery*

[101] Although no direct evidence was led by the Crown through which it could be shown that the Appellant and his co-accused were aware of the assault, the evidence of DW1 does more. It was her evidence the Appellant was one of two of the attackers who attacked and robbed her and the deceased of their property. She identified the appellant as one of the men who had remained with her, the co-accused in the vehicle and had subsequently told her he had the knives including the one used in the assault. Hers was one key piece in the evidence that not only linked the appellant with the commission of the offences.

[102] In the finale of the dramatic events around the deceased motor vehicle, the evidence shows that both the Appellant and the first accused had returned to the deceased at Mamkhulu bar. Both PW1 and PW3 told the court that after the two had managed to dislodge the vehicle from where it had got stuck they had driven it to the bar. That is where they were found by the Crown witnesses still inside the car- the difference being that this time the deceased had been placed inside the vehicle.

[103] From this evidence it is clear that the two must have been aware of the deceased and his condition.

*Intention to make common cause*

[104] Although there does not seem to be much by way of evidence as would found an assumption that there was a specific prior agreement between the accused persons to carry out the robbery and by extention to wound the deceased, the proven facts are consistent with an inference that at a point they acted on some design (hastily formed as may have been) to affront the deceased and to rob him. A necessary inference is that it must have been within their contemplation and expectation that in carrying out the robbery force could be used and there was a readiness to employ such means to carry out the robbery. From the evidence it emerged that both the accused were armed. The evidence therefore shows not only that the appellant actively took part in the activities but also that

*Active association*

[105] The court in assessing the evidence made a finding on the facts that not only had the accused persons both participated in the robbery wherein the deceased was mortally wounded, they assisted each other in so doing. The evidence does support this theory as in very material respects the two's actions were complementary to one another including in dealing with the car and their conduct in the aftermath to the point when they both fled.

*Mens rea – Dolus Eventualis*

[106] It falls on the Crown to establish the mens rea in the form of intention on the part of the accused to commit the crimes *in casu* murder and robbery. It must be shown that the Appellant shared an intent to commit the offence or that there was an act of active association in the commission of the offence from which

[107] From the evidence emerging during the trial it is clear that all the elements for the imputation of guilt on the basis of common purpose on the appellant had bee established on the totality of the facts.

[108] It is clear that the Appellant in associaton with his co-accused had immediately set out to achieve their object of robbing the deceased with whoever was in the motor vehicle with him; that object having been formed in their minds most probably immediately after the deceased had arrived on the scene. From the evidence it also emerges that both of the accused were armed with a knife with at least one of them armed with what has been described as a Rambo knife.

[109] From the evidence of DW2 the trial Court heard that there was more than one knife in the possession of the accused persons one of which was used as the weapon that caused the deceaseds fatal stab wounds. It is clear either one of them during that common mission of robbery inflicted the stab wound on the deceased.

[110] Without doubt the accuseds enterprise in the robbery was an act of violence which they must have been prepared to execute with the means at their disposal using force and violence. They were clearly prepared to use the knives and in that regard they must either had foreseen that in the act of subduing their victims harm would be inflcted on their victims. It is clear from the evidence that one of them used a knife to stab the deceased in a vulnerable part of the anatomy- the chest.

[111] The severity, angle and the trajectory of the knife in the stabbing was such that it was intended and did cause maximum bodily harm. It was of such a degree that in the use of the knife whoever between the accused did the stabbing, was so negligent that it can reasonably inferred that he was reckless and indiferent as to whether death would result therefore must have foreseen death being a likely outcome especially in light of the extent and location of the wound to the

deceased. Most probably the assailants were singularly fixated on their object which was to subdue the deceased.

[112] It is also clear from the wound inflicted on the deceased that it was not intended merely to frighten the deceased into giving up his property as a simple cut to a less vital part of his body would have. It was designed to immobilise and overcome the deceased with little regard to the degree of harm it would cause him. In this regard I am of the view that the trial court was correct in finding that the foreseability element was in the circumstances of this case was on the evidence available, fulfilled.

[113] The appellant even if he did not actually himself inflict the fatal blow on the deceased he did by his active association, being there on the scene and actually taking part in the perpetration of the robbery and the attach on the deceased and DW2shared the common cause with the first appellant to fulfill the requisite mens rea with his companion by operation of the doctrine of common purpose. The trial Court was, with respect, correct in finding that dolus eventualis was established.

[114] In this scheme of the evidence and the fuller facts it was necessary for the Crown to show that the accused persons had the intention to kill the deceased given the circumstances; it being sufficient to show that the appellant had actively associated with the first appellant in the commission of the robbery and by extension in the murder of the deceased. There was therefor sufficient evidential basis for a finding of guilt beyond reasonable doubt on the assesment of the overall evidence in its totality.

[115] Regard being had to the rules in the **Safatsa** and **Mgedezi** cases, I am of the view that the trial court court in evaluating the evidence correctly applied the criteria and concluded that the prerequisite elements for proving common purpose in respect of both charges had been satisfied. In both the counts of murder and robbery common purpose was a germane element. The fatal injury inflicted on the deceased on the evidence, was caused in furtherance of the robbery by the accused.

[116] The evidence also shows that it is the accused persons who jointly carried out the robbery. The trial court correctly observed that robbery definitievely entailsthe theft of a property by the intentional use or threat of violence to induce submission in the taking of the property. **(S v Maneli 2009 (1) SACR 509 (SCA) para 6;)** It is a crime involving both the theft of property as it does the performance of a violent act against the victim.

[117] On the evidence it emerged that the appellant and the first accused took the deceased's property and and that of his companion and in doing so applied force by use of violence using a knife as a weapon of choice. Their liability derives from a common purpose that the evidence availing the trial court shows. The evidence of the Crown and that of DW2 proves that they actively associated themselves in the commission of the crimes. Their finding of guilt by the trial court on the basis of the common purpose doctrine was, in my view correct.

[118] In the final analysis the appeal by the appellant against his conviction must fail.

APPEAL AGAINST SENTENCE

[119] As the appellant has also appealed against the sentence, I now turn to this aspect. His submissions in this regard were rather brief and not specified. Mr Mabila's only concern as indicated in the heads of argument is that the trial court may not have paid due regard to the submissions of the appellant in mitigation of sentence as pertains his personal circumstances and relative factors in meting out the sentence. In any case he maintained that the record was very scanty in regard to the Appellant's submissions in mitigation. These issues have already been dealt with in part earlier in this judgment.

[120] The established principle on matters of sentencing is that sentencing falls within the exclusive discretional province of the trial court that will only be interfered with on very circumscribed basis. There are numerous authorities in recognition of this principle as to render it truly entrenched in our jurisdiction and for that reason trite.

[121] The exceptions to the rule against interference with the trial courts sentencing discretion only lie in those circumstances where the sentence imposed by that court is demonstrably so unreasonable as to be patently excessive and inappropriate regard being had to the circumstances of the case and the operative factors; sometimes the phrase used is 'inducing a sense of shock' (**See S v Snyders 1982 (2) SA 694 (A))-** I do not regard the latter useful but rather emotive language. Another sitiation where re-consideration of a sentence may be made on appeal is where the discretion of the trial court has not been judiciously exercised and where the trial court misdirects itself on the law or on the facts (See **S v Rabie 1975 (4) SA 855 (A)**); or where there exists such a disparity between the sentence this Court would have considered appropriate and that imposed by the trial court **(See S v WT 1975 (3) SA 214; S v Hlaphezulu & Others 1965(4) SA 439 (A); S v Van Wyk 1992(2) SACR 147; Vusi Muzi Lukhele v Rex. Criminal Appeal Case No. 23/2004;**

**Benjamin Mhlanga v Rex Criminal Appeal Case No 12/2007; Sifiso Zwane v Rex Criminal Appeal Case No. 5/2005; Mbuxo Likhwa Dlamini v Rex Criminal Appeal Case No. 18/2011).**

[122] For purposes presently it has also been held that the Court may also intervene in instances where the trial Court has taken an extreme position in balancing the gravity of the offence against the personal circumstances of the accused by placing too much emphasis on the former **(S v Maseko 1982 (1) 99 (AD); S v Collett 1990(1) CR** at **456).**

[123] It is clear from the record that Counsel for the appellant invoked the youthfulness of the appellant ((20 years at the time) as well as other considerations including that the appellant was a first offender in gainful employment and had two minor children) in her submissions in mitigation of sentence before the trial court and the Court does make reference to this in the remarks in passing sentence. However it also appears that although the trial court mentions these factors in passing sentence, in my view greater emphasis seems to have been placed on the gravity of the offence and deterrence as sentencing policy and thus inclined towards a maximal sentence by the trial court.

[124] It appears the court regarded the Appellant's personal circumstances mainly as a factor only in so far as averting an imposition of a capital sentence.

[125] I recognise that the trial court will have had regard to the oft-cited triad of considerations in sentencing- taking into account the interests of society, the personal circumstances of the accused and the severity of the offence. It

becomes a question of **how the balance in light of the judgment itself was struck. In this regard the** approach to be taken by a sentencing court can best be illustrated by the instructive remarks of **Friedman J** in the case of **S v Banda and Others 1991 (2) SA 352 (B) AT 355 A-C** when he said:

> "T**he elements of the triad contain an equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counter balance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of others. This is not merely a formula, nor a judicial incantation: the mere stating thereof satisfies the requirements. What is necessary is that the court shall consider, and try to balance evenly, the nature and the circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the criime on the community, its welfare and concern."**

[126] To this matrix should be added the other dimension of sentencing to do with the theories on the grand sociogical objects of sentencing that balances deterrence-prevention, retribution and rehabilitation as the rationale behind the sentencing sanction **(See Director of Public Prosecutions, KwaZulu Natal v P 2006 (1) SA 243 (SCA) para 13.)**

[127] Equally, considerations of iniformity and consistency in the range and profile of sentences for like offences in relatively similar circumstances have been considered an appropriate principle in maintaining a rational comparative practice in sentencing. This principle has been given recognition by this Court as a desirable sentencing policy and approach in a number of decisions (**See Mandla Bhekithemba Matsebula v Rex Criminal Appeal No. 02/2013 SZSC 72 (29 Nov 2013); Samkeliso Madati Tsela v Rex .op cit; Mandla Tfwala v Rex Criminal Appeal Case 36/2011 [2012] SZSC 15 (31 May 2012) and in Bhekiwe Motsa v Rex, Criminal Appeal Case No. 246/2008).**

[128] In the **Bhekizwe Motsa** case this court has emphasised the importance of achieving uniformity in sentencing in observing that:

> **"the practice of being guided by a range of sentences previously imposed by courts for the same offence does not impair in any way the discretionary power of sentencing vested on a court by statute. So that a court can in justifiably compelling circumstances impose outside the range of custodial sentences for that offence".**

[129] It is clear that the trial court in the case at hand, considered the circumstances of this case exceptional enough to consider a maximal sentence, however the judgment does not show that due regard was paid to the other counterbalancing factors. If it did this does not appear from the very terse remarks in the judgment on sentencing.

[130] As regards uniformity it bears mention that a discernible median range of sentences seems to have emerged in recent times in murder conviction cases. The readily available instances that are illustrative of this trend all average around a 15 year custodial sentence. One must hasted to add that these cases factor in a finding whether extenuating circumstances or mitigating factors exist and therefore are not intended to be cookie cutter examples.

[131] In **Sihlongonyane v Rex, Criminal Appeal Case No. 15/2010** a sentence of 20 years was reduced by this Court to 15 years. In the case of **Sibusiso Goodie Sihlongonyane v Rex** a 27 year imprisonment term for murder with extenuating cirumstances was reduced to 15 years; In **Sibusiso Shadrack Shongwe v Rex** there this Court had a sentence of 22 years reduced to 15 years; In **Elvis Mandlenhosi Dlamini v Rex** this Court upheld a sentence of 15

years imprisonment in circumstances where the relative your of the appellant was considered against the severity in the manner of the killing of the deceased involving a brutal assault by bludgeoning of the deceased with an iron rod.; In **Mbabane J Tsabedze and Ano v Rex** this court had a 15 year sentence reduced to 11 years for a murder where the method involved the infliction of several stab wounds; In the case of **Mandla Tfwala v Rex** this court again upheld a sentence of 15 years in circumstances where the youthfulness of the offender was considered against the repeated shooting of the deceased at a point blank range.

[132] This Court has in the case of **Njabulo Mamba v Rex (10/2015 [2015] SZSC 31 (09 December, 2015**) this court has in considering the relative youth of the appellant of 17 years at the time of the commission of the offence, deemed a reduction of an 18 year sentence to 12 years taking into account also the fact that the appellant was a first offender and the salutory notion of giving due regard to rehabilitation prospects.

[133] In this case, mindful that the trial court found no extenuating circumstances, I am of the view that regard being had to the decided cases and the trends in sentencing on murder convictions a sentence of 20 years would have been appropriate.

[134] The appeal against conviction is dismissed and that against the sentence is allowed, wherefore the following order is hereby made:

It is ordered that:

**1. The appeal against sentence is hereby upheld;**

2. **The sentence of the trial court of 26 years imprisonment for murder is hereby set aside;**

3. **The Appellant is sentenced to 20 years imprisonment for the count of murder such sentence to run concurrently with the sentence of 8 years for the count of robbery with effect from the 12th July, 2012.**

_____

C. MAPHANGA

ACTING JUSTICE OF APPEAL

I AGREE

_____

K.M. NXUMALO

ACTING JUSTICE OF APPEAL

I ALSO AGREE

_____

M. J. MANZINI

ACTING JUSTICE OF APPEAL

For the Appellant: Mr Mabila

For the Respondent: Mr S Dlamini