



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 10/08

In the matter between

REX

Applicant

and

**SICELO CHICCO DLUDLU
MAKHOSINI DODGE DLUDLU
JAMES DUMISANI DLUDLU**

**1st Respondent
2nd Respondent
3rd Respondent**

Neutral Citation: *Rex v Sicelo Chicco Dlodlu & Others* (10/08) [2012]
SZHC 219 (20 September 2012)

Coram: **Mamba J**

Heard: **21, 26 & 27 July 2010 and 05, 10 & 10 September
2012**

Delivered: **20 September 2012**

- [1] Criminal Law – deceased breaking into house of A1 and stealing money therefrom. Portion of money stolen recovered. Accused who are brothers assaulting deceased to extract full confession and disclosure from him – deceased heavily and badly beaten with sticks and dies.
- [2] Criminal Law – doctrine of common purpose – application thereof – accused specifically agreeing to assault and do assault deceased to extract a confession from him – injuries so severe that deceased dies therefrom – each accused liable based on his own individual intent to kill.
- [3] Criminal Law – *mens rea* – though accused not positively or deliberately intending to kill the deceased but foresee that their actions might result in his death but persist in such assault recklessly not caring whether he dies or not – requisite intention to kill in the form of indirect intention established and accused guilty of murder.

- [1] The three accused persons herein face an indictment wherein they are alleged to have murdered one Sabelo Maseko (hereinafter referred to as the deceased). It is alleged that they committed this crime on or about 15th January, 2008 at Maphalaleni in the Hhohho region. It is alleged further that they acted in furtherance of a common purpose.
- [2] Upon being arraigned about two years ago, on 21st July 2010 to be precise, they all pleaded not guilty to the indictment. I hasten to add from the outset, that the facts that led to the death of the deceased are largely and substantially common cause. There are however, two contentious points, namely; First, the extent of the injuries that each of the accused inflicted on the deceased and secondly whether or not the accused had the necessary intention to bring about the death of the deceased. Needless to say the Crown has submitted that each of the accused had such intention to kill, whilst the defence submitted or argued to the contrary. I examine these issues below in relation to the evidence before me herein.
- [3] In terms of the post-mortem report that was handed in as exhibit A by the Police pathologist Dr R.M. Reddy (Pw6), the deceased died as a result of multi injuries. He noted that there was a collection of blood in the subtissue and brain and that there was no chance that the deceased could have

survived from the injuries he sustained. The pathologist noted the following ante mortem injuries on the body of the deceased:

- ‘1. Abrasion over forehead 0.3 cms, 0.7cms contusion scalp 2.1 cms frontal region with 40ml subdural haemorrhage over brain.
2. Contused abrasions over right shoulder 1.2 x 0.3 cms, 0.4 x 0.2 cms over left shoulder 0.7 cm, 0.3 cms, upper region front of chest 12.1 cms area, back of trunk lower region to buttocks, right thigh 28 x 13 cms area effusion blood in soft tissues.
3. Contused abrasions over left forearm, arm 3 cms, 8 cms area effusion blood in soft tissues.
4. Contused abrasions left iliac region 2 cms, 7.3 cms area left thigh to leg 30 x 14.1 cms area present effusion blood in soft contused abrasions over limbs, buttocks, trunk, intermingled vary in size 0.3 cms to 6.5 x 0.2 cms to 2.2 cms.’

Under cross examination, the doctor stated that these injuries were not consistent with the deceased having received them during a fall. He said these injuries were caused by blunt force such as a stone, a stick or a rope.

- [4] It is common cause that on or about 14th January, 2008, the first accused had his house broken into and a sum of about E9000.00 stolen therefrom by the deceased. That night, the three accused persons together with Sabelo Kunene (Dw4), a member of the community police in the area went to the home of the deceased and reported to the deceased’s father (Pw1) that they had information that the deceased was responsible for the housebreaking and theft of the money belonging to the first Accused. Pw1 denied any

- knowledge of this and also informed the accused that to the best of his knowledge, the deceased was not at home then. A3 was also a community police in the area and still is.
- [5] The accused managed to peep through one of the windows to the deceased's house and saw him there lying fast asleep in his bed. Upon entry into the house, a lot of money mainly in E200.00 notes was found strewn all around the deceased. Some was also found hidden in his underwear garments. In all just over E4000.00 was found with the deceased.
- [6] On being questioned by the accused, the deceased admitted that the money found with him was part of the money he had stolen from the first Accused's house. He told them further that he had used the rest in *inter alia* buying liquor and a mobile telephone from a Maphosa boy at Emsengeni. He had paid E800.00 for the telephone, he said.
- [7] The first Accused called for a rope and the deceased's hands were tied behind his back and he was led out of his home on the way to where he had bought the mobile telephone. Present in the group that led/took the deceased away from his home were; all three accused persons, Dw4, Sunday Maseko, Lucky Dlodlu and Phumlani Dlodlu. Jabulani Maseko

(Pw2), a brother of the deceased was also present. After consulting his father (Pw1) he followed these people to the Maphosa homestead. He told the court that the first accused held the deceased by the rope that tied his hands and together with the rest of the accused continuously hit the deceased with sticks as they proceeded on their journey.

[8] But before going to the Maphosa homestead the accused led the deceased to KaPholile's, the home of Dumisani who had been reportedly seen the previous day in the company of the deceased. Dumisani was found at home and was questioned about the theft of the money in question. He was also beaten with a stick by the first accused. From there, the party proceeded to the home of Vilakati to ask for a motor vehicle to transport them to Maphosa's homestead. Before they got into the motor vehicle, the accused continuously assaulted the deceased with their sticks. The deceased was stripped off his pair of trousers and was left with his underwear. He was caused to lie prostrate on the ground and heavily assaulted by accused as Pw2 and Dw4 stood by and watched. At this stage, Pw2 said, the first accused was beating the deceased whilst the second accused (A2) held him by his legs. When Pw2 tried to call someone using his mobile telephone, A1 noticed this, and he warned all present that no one but himself as the injured party, could call the police. He (A1) warned that any one who

would disobey this order would have his home burnt down by him and his children killed.

[9] When Vilakati's motor vehicle arrived, A1 ordered the deceased to get into the motor vehicle and when he failed or struggled to do so, he was again repeatedly assaulted by A1 and told that he had managed to climb through the window into A1's house and therefore should also manage to get onto the motor vehicle. The assault continued relentlessly. A1 and A2 pulled the deceased onto the motor vehicle and they proceeded to Maphosa's home. Dumsani Dlamini, Pholile Ginindza, Phumlani, Pw2 and Lucky Dlundlu remained behind and waited near the home of A3 until the accused and the deceased returned. The deceased was commanded by his captors to alight from the motor vehicle. He failed and he was again assaulted by them. Eventually A2 pushed him off the motor vehicle onto the ground. He was again assaulted whilst on the ground. When he showed signs of getting weak, A2 again assaulted him and said he was feigning death. A1 declared that should the deceased die, he would bury him. It was at this stage that Pw2 told Dw4 that the deceased was getting weaker and weaker and might die. Dw4 did not respond to Pw2's concerns.

[10] Pw2 told the court that on seeing that the deceased was in a very bad condition and the assault by the three accused was going on unabated, he

informed A3 who was also a community police that he was leaving the scene. In response A3 told him that they were “still at work on the deceased” and would return him to his home once they were through. A1 added that they would take the deceased home but would return in the morning and take him to the mountain where they would cut off his legs, if he fails to confess and point out to them the rest of the money stolen by him.

[11] After this Pw2 went home and reported to his parents what he had witnessed being done to the deceased. They telephoned the police but before the police came the accused brought the deceased in a wheelbarrow and dumped him on his bed. He was in great pain, weak, moaning and groaning and hapless. They washed him before he was taken by the police who came at about 5.30 a.m.

[12] The above evidence by Pw2 was materially and substantially corroborated by Pw3, Dumisani Dlamini. This witness also told the court that when Jabulani Dlodlu remarked that the deceased had been badly hurt and would die, he was assaulted by A1 such that he ran away from the scene. He also informed the court that during the beatings, A2 told the deceased that he had dared the Dlodlu’s who were untouchables and was paying for this. He

testified further that the accused came dragging or pulling the deceased on the ground using the rope that tied his hands.

[13] As stated earlier in this judgment, the accused did not deny ever assaulting the deceased. Under cross examination of the crown witnesses, it was put to them that on the way to Pholile's home the deceased denied having been with Pw3 and this prompted the assault by the Accused. And, it was also pointed out to Pw2 that when the Maphosa boy denied any association with the deceased, they were both assaulted until the Maphosa boy admitted. This beating, it was pointed out by the defence, was on the suggestion of Dw4, Sabelo Kunene, a Community Policeman.

[14] The accused denied that upon the discovery of the money in the deceased's house, Pw1 suggested that the matter should be referred to the Police for the law to take its course. Instead, all the accused stated that Pw1 said the accused should deal with the deceased as they thought fit as he, Pw1, could no longer tolerate the criminal acts by the deceased. Again, the accused denied that they assaulted the deceased in the manner described by Pw2 and Pw3. They said the assault was moderate and aimed at extracting a full confession and disclosure from and by the deceased. They all said small sticks were used in the assault and at one stage the shaft of a knob stick was used. They each totally disavowed any intention to kill him. They further

stated, implicitly that is, that they never foresaw that by beating him in the manner or way they did, he might die. They pointed out to the fact that when they realized that he was failing to walk up the hillock, they carried him in a wheelbarrow and transported him home to his bed. It was also stated by the accused that they hit the deceased on his back and buttocks and did not hit him on dangerous or sensitive areas of his body. The accused also confirmed that they jointly agreed to assault the deceased for the purpose of extracting a confession and full disclosure from him. In evidence in court, each of the accused admitted having assaulted the deceased with a stick A3 said he used the shaft of his knob stick. They all agreed that there was an agreement amongst them to assault him.

[15] The accused have each sought to minimize their respective roles in assaulting the deceased. The evidence of Pw2 and Pw3 and the post-mortem report, all which I accept as it was not seriously disputed or challenged, establish in my judgment the full extent and gravity of the injuries suffered by the deceased. These injuries were all inflicted on him by the accused who were acting jointly in furtherance of a shared or common purpose.

[16] There is no denying that the deceased had before the assault on him started, confessed that he had unlawfully broken into the house of A1 and stolen his

money therefrom. His actions were thus unlawful. But, this did not give license to either A1 or his co-accused to assault the deceased at all or in the manner they did. It cannot be said that the accused were in such circumstances acting in defence of the property of A1. They have not said so in their defence. Their defence is that they wanted the deceased to confess and also give them the balance of the money that had not been recovered. They also stated, rather disgracefully I think, that they were permitted to deal with the deceased as they liked by his father, Pw1. They had no right to take the law into their own hands. Revenge is the law of the jungle where might is right and has no place in a civilized society such as ours. What they did in assaulting the deceased was unlawful, in this instant and an injustice to the deceased. Injustice is injustice is injustice and a crime. An injustice can never be justice even for the unjust.

[17] There has been no suggestion or evidence that the deceased suffered the injuries observed and described by the doctor in any other way or manner than that described by the crown witnesses. These injuries were inflicted on him by the three accused jointly. There was an expressed agreement between them to assault him. The assault went on for a long time. It was sustained, prolonged and intense. It went on and was persistent even when the deceased showed visible and obvious signs of getting weak. In reaction to this condition, the accused declared that he was feigning death or that if

he died, they would bury him or that he was paying for his actions of daring the untouchables. This clearly proves in my judgment that they all realized that the deceased might die as a result of the injuries they were inflicting on him but they continued, recklessly not caring whether he did die or not. Their act of transporting him in a wheelbarrow and dumping him at his home does not detract from this fact or conclusion. Even their dumping him there does not show or prove that they were sorry and wanted to reverse or even mitigate or ameliorate what they had done. They just dumped him on his bed and left him there to die or just did not care whether he died or not.

[18] Whilst I accept, that the accused did not set out to kill the deceased in the sense of having a direct intent to bring about his death, I have no hesitation at all in concluding that the essential elements of a direct intention to kill have been established herein beyond any reasonable doubt by the crown. I restate these requirements which were recently stated by this court in **R v DUMSANI SAMSON GINA, Crim Case 90/2006**, judgment delivered on 27th July, 2012 (unreported):

‘11. Whilst there is no direct evidence showing that the accused purposely set about to kill the deceased, he must have realised that in stabbing or injuring the deceased in the manner described above, his actions may result in his death but he persisted recklessly not caring whether or not death was the final outcome. In **MAPHIKELELA DLAMINI v R 1979-1981 SLR 195 at 198D-H** Maisels P Propounded the law as follows:

‘The law in cases of this nature has been authoritatively laid down in Swaziland in the case of *Annah Lokudzinga Mathenjwa v R* 1970 – 1976 SLR 25. The test there laid down is as follows, and I see no reason for complicating the situation in this country in the manner in which it has been complicated in the opinion of many people in South Africa. In *Annah’s* case the law was stated as follows, at 30A: “If the doer of the unlawful act, the assault which caused the death, realised when he did it that it might cause death, and was reckless whether it would do so or not, he committed murder. If he did not realise the risk he did not commit murder but was guilty of culpable homicide, whether or not ... he ought to have realised the risk, since he killed unlawfully”.

My Brother Dendy-Young has referred to certain remarks and possibilities and appreciation of risks. At 30D of the judgment in *Annah’s* case to which I have referred the then President of this court, Mr Justice Schreiner said: “It has been suggested that a finding that a person must have foreseen or appreciated a risk is not the same as a finding that the person did in fact foresee or appreciate the risk: I do not agree. It is not a question of law but of the meaning of words. I find it meaningless to say, He must have appreciated but may not have”. In this statement of the law Caney JA on the same page concurred. Milne JA at 32 also concurred in this statement of the law although he disagreed in regard to certain other aspects of the case itself. He said this at p 32F: “I should like first of all to associate myself very strongly with the learned President’s view that when it is correctly held that a person ‘must’ have appreciated that his act involved a risk to another’s life, it is inescapable as a matter of English, that what is held is that the person did, in fact, appreciate the risk”. I thought it right to mention these matters because for many years to my knowledge *Annah’s* case has been followed in Swaziland and although I share the regret expressed by Mr Justice Schreiner in *Annah’s* case that there may be differences between the law as applied in South Africa, if differences arise they must be given effect to for, as was said by Schreiner P at p29 of *Annah’s* case, we are obliged to apply what we understand to be the law of Swaziland, even if divergence from the law of the foundation member of the South African Law Association is the result. I do not wish my concurrence with the result of this appeal as proposed by my Brother Young as being in any way a departure from the principles as laid down in *Annah’s* case to which I have referred.’

Isaacs JA concurred and also added: ‘My agreement is not to be considered as being an agreement with a departure from *Annah’s* case’

See also *VINCENT MAZIBUKO v R*, 1982 – 1986 (2) SLR 377; where the headnote reads:

‘A person intends to kill if he deliberately does an act which he in fact appreciates might result in the death of another and he acts recklessly as to whether such death results or not.’

[19] The issue of the doctrine of common purpose was discussed by this court in **R v MEFIKA NGWENYA AND ANO Crim. Case No. 418/11** judgment delivered on 9th August, 2012 in the following terms:

[18] The principles involved in the notion or concept of acting in furtherance of a common purpose were, in my judgment sufficiently and authoritatively stated in *S v MGEDEZI AND OTHERS*, 1989 (1) SA 687 at 705I-706B:

‘In the absence of proof of a prior agreement, accused No 6, who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be held liable for those events, on the basis of the decision in *S v Safatsa and Others 1988 (1) SA 868 (A)*, only if certain prerequisites 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 on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea*; so, 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.’

[19] In the present case A1;

- (a) was at the scene of crime,
- (b) he actually participated in the assault on the deceased,
- (c) he actively took part in what the rest of the mob were doing in assaulting the deceased. At one stage A1 told Walter to kill the deceased during the attack.
- (d) by pouring petrol onto the body of the deceased and twice attempting to set him alight, he plainly had the intention to bring about his death. When he failed to set the deceased on fire he passed the burning match stick to A2 who successfully burnt the deceased. The same is true of A2. When you set alight someone whose body has been drenched in petrol, you clearly have the requisite *mens rea* in the form of direct intention (*dolus directus*) to bring about his death.

[20] Where two or more persons acting in furtherance of a shared or common purpose are engaged in a murderous attack on someone and they have the requisite intention to kill, the issue of who inflicted the fatal blow becomes irrelevant. The joint common purpose is achieved by one or more for the rest. There was clearly a shared or common purpose between A1 and A2 to kill the deceased as manifested in their burning him.'

It has to be emphasized that each accused is guilty based on his own intent and action. Thus an accused person who does not take part on the assault and was not a party to any agreement to commit the crime, though present at the scene of crime as a mere by stander where the victim is killed cannot be said to have manifested an intent to kill the deceased. The suggestion that under the doctrine of common purpose one is made liable for the actions of another and on the basis of transferred intentions of his co-participants is in my view flawed and indeed illogical. The intention or purpose is shared rather than transferred or the intention of one accused is imputed onto another. The guilt or liability of each accused is assessed and

determined individually such that it would be perfectly legitimate to find different participants in one transaction guilty of different offences; eg murder and culpable homicide or assault. Again in *Mgedezi* (supra) at 703H the court emphasized this point and stated:

‘The reference, in purely general terms, to liability on the basis of a common purpose, in para (3) of the above quotation from the judgment, cannot warrant an inference of liability in respect of all the accused *en bloc*. The trial Court was obliged to consider, in relation to each individual accused whose evidence could properly be rejected as false, the facts found proved by the State evidence against that accused, in order to assess whether there was a sufficient basis for holding that accused liable on the ground of active participation in the achievement of a common purpose. The trial Court’s failure to undertake this task again constituted a serious misdirection.’

[20] For the foregoing, all three accused persons are found guilty of murder. Each had an indirect intent to kill the deceased.

MAMBA J

For the Crown:

Mr. A. Makhanya

For the Defence:

Mr. C. Dlamini