



**IN THE HIGH COURT OF SWAZILAND**

Criminal case No: 36/2007

In the matter between:

**REX**

**VS**

**SIMANGA MASHAYA  
THEMBINKOSI MASHAYA  
MSINGATSENI SIMELANE**

Neutral citation: *Rex vs Simanga Mashaya & 2 Others (36/2007) [2012] SZHC163 (July 2012)*

**Coram:** **M.C.B. MAPHALALA, J**

**Summary**

Criminal law – accused charged with murder – doctrine of common purpose invoked – active association of the accused in the commission of the offence proved beyond reasonable doubt – accused accordingly convicted and sentenced to 15 years imprisonment.

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**JUDGMENT  
16<sup>th</sup> JULY 2012**

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- [1] On the first Count, the three accused persons were charged with crime of murder and it was alleged by the Crown that on the 29<sup>th</sup> December 2006 at Gayinethi Area, Kontshingila chiefdom, in the Shiselweni Region, the accused acting jointly and in furtherance of a common purpose unlawfully and intentionally killed Mmeli Masuku. They all pleaded not guilty to the offence.
- [2] On the second count the first accused was charged with the crime of Assault with intent to cause grievous bodily harm, and it was alleged by the Crown that on the 29<sup>th</sup> December 2006 at Gayinethi Area, Kontshingila Chiefdom, the accused unlawfully and with intent to cause grievous bodily harm, assaulted Sibuyile Zakhele Sangweni. He pleaded guilty to the offence.
- [3] On the third count the first accused was charged with the crime of Robbery and it was alleged by the Crown that on the 29<sup>th</sup> December 2006 at Gayinethi Area, Kontshingila Chiefdom, he unlawfully and intentionally assaulted the deceased Mmeli Masuku, and by using force and violence to induce submission by Mmeli Masuku, he took and stole from him E170.00 (one hundred and seventy emalangeni) in cash and a Nokia 1600 cellphone valued at E400.00 (four hundred emalangeni). He pleaded not guilty to the offence.

[4] PW1 Bongiwe Dlamini testified that on the 29<sup>th</sup> December 2006 she was at the homestead of Mrs Duduzile Simelane (nee Mkhwanazi) at Gayinethi Area. She was with Gcinile Simelane, Shakes Shabalala, the deceased and Talosi Sangweni sitting at the back of a bakkie drinking liquor. They had started drinking at 4 pm until 8pm; and, a group of boys were sitting above the homestead but outside the premises. They saw crickets being fired towards their direction; fighting subsequently ensued between the deceased and the group of boys. The deceased was physically assaulted by the group of boys.

[5] They heard the deceased crying but they couldn't identify who amongst the boys was assaulting him. He ran to a nearby Simelane homestead, and the boys ran after him. This witness was able to identify the first accused, the third accused, Siphon Simelane and Tito Ndlovu; she could not identify the others. Seeing that they were pursuing him, he turned and ran back to where he was sitting before. She saw the first accused assaulting him just before he climbed onto the back of the bakkie. She recognised that he was injured.

[6] She saw the second accused hitting Talosi Sangweni; and, the first accused also hit Talosi Sangweni with a log and he fell down. By that time the

deceased was inside the motor vehicle, and, the first accused pointed at the deceased saying he had stabbed him.

[7] The first accused pulled the deceased out of the motor vehicle, and, the third accused hit the motor vehicle with a log. The deceased managed to run away but the group of boys followed him to the fields; the group included Tito Ndlovu, Bheki Simelane, and all three accused persons. The boys were carrying sticks and the first accused was armed with what looked like a spear. However, she could not ascertain what happened in the fields because it was dark.

[8] When they came back, she heard the first accused saying that they have killed the dog and it was lying in the fields; she told the court that the first accused was referring to the deceased. They went to look for him but couldn't find him. They called the police who subsequently arrived; and, the first accused approached the police and led them to where the deceased was lying in the fields. The group had disappeared when the police arrived, and, the first and second accused came to the police. She was present when the first accused led the police to the fields where the deceased was lying; the second and third accused were also present. The deceased was still alive but was injured. The police took him to hospital.

[9] Under cross-examination, the defence put to PW1 that it was Tito Ndlovu who fired the crickets towards them, and, she conceded that she was unable to identify the people within the group who had fired the crickets because it was dark. However, she reiterated that the accused were part of the group of boys she saw chasing after the deceased when he ran towards the Simelane homestead. She denied recording a statement with the Police in which she accused the deceased of hitting the first accused with an open hand; she denied seeing the deceased hitting the first accused with a fist as alleged by the defence.

[10] The defence further put it to PW1 that when the deceased chased after Tito Ndlovu, the group of boys ran away and he then chased after the first accused because he was wearing clothes similar to those worn by Tito Ndlovu. However, PW1 denied that the deceased chased after anyone in the group but insisted that it was the group that chased after the deceased after he had enquired who had thrown the crickets at him. PW1 further denied that the deceased hit the first accused with a fist. She further denied that the deceased was armed with a knife or that he stabbed the first accused. However, she admitted that when the deceased returned to the motor vehicle, the first accused had told her that he had been stabbed by the deceased, but, she never saw the stab wound. She returned to the motor vehicle and was bleeding from the nose; and he was being assaulted by the

first accused with fists, and, the group was following from behind. He went inside the motor vehicle and locked himself and slept on the car seats. The first accused then left for his home to fetch something.

[11] PW1 told the court that the motor vehicle belonged to Talosi Sangweni. She reiterated that the deceased came out of the motor vehicle after the third accused had broken a window after hitting it with a log; they flattened the tyres and further put stones in front of the motor vehicle. She reiterated that the third accused opened the door and the first accused pulled the deceased out of the motor vehicle; after thirty minutes the accused returned and declared that they had killed the dog, referring to the deceased.

[12] PW2 Gcinile Simelane is the daughter of PW3 Duduzile Simelane (nee Mkhwanazi). She testified that on the 29th December 2006 she was at her homestead together with PW1, Talosi Sangweni, Shakes Shabalala as well as the deceased. She told the court that a group of boys from the area were sitting next to the homestead under a tree, and a cricket was thrown at the motor vehicle. The deceased went to enquire from the group of boys why they were throwing the cricket at the motor vehicle.

[13] Subsequently, the first accused came and told them that the deceased had stabbed him. The deceased returned and they put him inside the motor

vehicle. The three accused pulled the deceased out of the motor vehicle, and, he ran away towards the fields. The other boys in the group were also present including Bongani Dlamini, Siphon Simelane and Mongi Sithole. The accused and the other group of boys pursued the deceased into the fields.

[14] The first accused came back and declared that they had killed the dog, referring to the deceased. They went to the fields with PW1 and found that the deceased had been assaulted. They phoned the police who arrived and took him to hospital. The deceased was in a critical condition.

[15] PW2's mother subsequently arrived from another homestead and learned what had happened. The first accused told her that he had been stabbed by the deceased and that he would revenge. PW3 apologised to the first accused for the incident.

[16] Under cross-examination PW2 told the court that the person who threw the cricket at them was Tito Ndlovu who was also part of the group of boys. She told the court that the deceased approached the group of boys to enquire why they were throwing crickets at them. She admitted that they had been drinking liquor with her companions and the deceased since 4 pm; and, that the commotion only started at 8.00 pm. She also told the court

that the homestead was lit with electricity and that she could see everything taking place within the premises.

[17] She admitted that she did not recognise the physical condition of the deceased and could not confirm if he was bleeding as alleged by PW1. She told the court that she saw the first accused hitting the deceased with a fist on the face when they pulled him out of the motor vehicle. Her evidence was that together with PW1, they searched for the deceased and found him in the fields; however, PW1 testified that it was the first accused who pointed out at the deceased in the fields in the presence of the police.

[18] PW3 Duduzile Simelane and mother of PW2 told the police that she sells liquor at her marital homestead; and, that she was not at home on the 29<sup>th</sup> December 2006 when this incident occurred. She returned home in the evening at about 7pm; and, that she heard crickets being fired by a group of local boys behind her homestead. She rebuked them and told them to move away.

[19] The first accused reported to him that she had been stabbed by the deceased, and, she advised him to go home, and undertook that she would take him to hospital the following day. The first accused left and came back shortly carrying a knobstick and others carrying logs. The motor



vehicle was blocked with logs; she told the first accused and the group of boys to desist from attacking the deceased because the first accused was not seriously injured. Mongi Sithole told her that the deceased could not outrun them; this was after the deceased had run away. After this she went to sleep.

[20] The police later arrived and asked for her. The first accused told the police that the deceased had stabbed him without provocation; then, the first accused led the police to the scene of crime.

[21] She maintained her evidence under cross-examination. She reiterated that she never saw the deceased but only heard that he was in the motor vehicle, and, that he later came out and ran away from the group of local boys. She confirmed that afterwards the group of boys disappeared including the accused, and that the first accused resurfaced when the police arrived to tell them that he had been stabbed by the deceased.

[22] PW4 Sibuyile Zakhele Sangweni in his evidence-in-chief told the court that on the 29<sup>th</sup> December 2006, he went to the homestead of PW3 to buy liquor and cigarettes; he was with PW1, PW2, Mashaba and the deceased. He told the court that he doesn't know the surnames of his companions. He confirmed that he was driving an Isuzu white van and that when they were

drinking at the homestead of PW3, they were sitting on the back of the van. He further corroborated the evidence of PW1 and PW2 that a group of boys subsequently fired crickets at them.

[23] He went inside the house to buy more cigarettes, and, on his return he discovered that the group of boys had assaulted the deceased and he had fallen down. He was subsequently assaulted by the group of boys; and some women washed his injuries using tap water. Suddenly he saw the group of boys running downwards chasing after the deceased after taking him out of the motor vehicle. A door to his motor vehicle as well as his tyres were damaged by the group of boys. He was subsequently taken to hospital by the police. He maintained his evidence under cross-examination.

[24] PW5 Thabiso Hlatshwayo stayed in the same homestead with the first and second accused; he was related to them as their niece. He told the court that on the evening of the 29<sup>th</sup> December 2006, he was at home when the first accused arrived; he was injured. The first accused took his weapons with him, a knobstick and another weapon he couldn't identify; and, he left to the homestead of PW3.

[25] Under cross-examination, he told the court that they followed the first accused after he had taken his weapons. On arrival at the homestead of PW3, they found that there was commotion; and, Bheki Simelane took the spear and knobstick from the first accused and instructed PW5 to take these weapons home.

[26] PW6 Sibhekile Masuku, the sister to the deceased, told the court in her evidence in-chief that his brother died on the 30<sup>th</sup> December 2006 at 10am the following day after he had been assaulted. Her brother had arrived at home on the 29<sup>th</sup> December from Matsapha where he was working; he had come to spend the New Year holiday with the family. He left home soon after his arrival to visit his friend; and, he was carrying his cellphone a Nokia, Khakhi in colour. She identified the cellphone in court.

[27] PW7 Sibusiso Ndlovu was introduced in court as an accomplice witness. Before giving his evidence in-chief, he was duly warned by the court. He told the court that on the 29<sup>th</sup> December 2006, he was sitting next to the homestead of PW3 with a group of local boys; among the boys he recalled Wandile Simelane, Eric Dlamini, Siphon Simelane, another Wandile Simelane, the three accused persons as well as Melusi Simelane.

[28] Melusi Simelane arrived at the homestead of PW3 carrying a cricket; he lit it and it exploded to the direction of a car parked at the homestead. PW1, PW2 and two other boys were sitting at the back of the motor vehicle. He knew Bongiwe Simelane and Gcinile but he did not know the two boys.

[29] He didn't notice whether or not the cricket hit the people in the motor vehicle. One of the boys said they should not harm them with the cricket; then the boy ran towards them. They ran away and he pursued them to a nearby Simelane homestead. He caught the first accused and they heard him crying and shouting. He assaulted the first accused and he retaliated; they turned back to assist the first accused. They assaulted him with fists and kicked him as well. He fell and they left him, and he was taken to the motor vehicle by the other man since he was unable to walk.

[30] The first accused was stabbed in his hand, and, he reported this to PW3. The first accused then went home and came back with a spear and a knobstick. PW7 later identified these weapons in Court during the criminal trial. When he returned from home, the first accused asked for the deceased, and, Bhekithemba Simelane blocked him from going to the deceased who was inside the motor vehicle. The deceased opened the door-lock from inside intending to run away, the third accused took a log which was on the ground next to the motor vehicle intending to hit the deceased

but the log hit the motor vehicle. The deceased came out of the motor vehicle and ran away and, the accused as well as the other boys pursued him.

[31] The first accused asked for the deceased, and, Bhekithemba Simelane blocked him from going to the deceased who was inside the motor vehicle. The deceased opened the door from inside intending to run away; the third accused took a log which was on the ground next to the motor vehicle intending to hit the deceased but the log hit the motor vehicle. The deceased came out of the motor vehicle and ran away; and, they pursued him.

[32] The deceased fell down in the fields and the three accused assaulted him; the third accused was carrying a log. PW7, Melusi Simelane and Bhekithemba Simelane took him and placed him next to the pathway; he was motionless and couldn't move. They left him there and went home.

[33] A police van arrived and the first accused went to the police and asked them to take him to hospital. The first accused gave PW7 a cellphone to keep, a Nokia 1600 Silver grey in colour; then he left with the police to hospital and later Hlatikhulu Police Station. On the following day the

police came and collected PW7 and the other group of boys who were involved in the incident.

[34] PW7 admitted that they were questioned by the police about the cellphone belonging to the deceased and he didn't tell them about the cellphone which he was given by the first accused on the date in question. They were released by the police on the following day; and, when he arrived home, he told his family about the cellphone. His family advised him to inform the police about the cellphone; he phoned the police and they came to collect it.

[35] The police asked PW7 if he knew any money taken from the deceased or which he was given by the first accused, and, he denied being given money by the first accused; however, he admitted seeing money in the possession of the first accused when they were in the police cells. The first accused had shown him the money saying he had brought it from home; however, PW7 admitted that when the police asked them to declare their assets before being locked in the cells, the first accused did not declare the money.

[36] Under cross-examination PW7 admitted that all three accused persons were present when the deceased chased them to a nearby Simelane homestead. He further admitted that the deceased caught up with the first accused and hit him; however, the first accused had retaliated, and, that he found them

fighting. He further admitted that all the accused including himself and the other members of the group of boys subsequently hit the deceased with fists and kicked him. He further admitted that they also pelted and hit the deceased with stones; and that the deceased was bleeding as a result of the consistent physical assault.

[37] He confirmed that Bhekithemba Simelane disarmed the first accused of the spear and the knobstick he had fetched from home, and, he gave the weapons to Thabo Hlatshwayo to take them home. He also confirmed that the deceased could not walk after they had assaulted him. Similarly, he confirmed that when the deceased was being pulled out of the motor vehicle, the third accused was armed with a log. He reiterated that all three accused assaulted the deceased after he had fallen in the fields, and, that they found the three accused assaulting him.

[38] PW7 further maintained and reiterated his evidence that the first accused had given him the cellphone to keep it and that he showed him the money in the police cells in the presence of Melusi Simelane, Eric Dlamini and Wandile Simelane.

[39] PW8 Sergeant Sabelo Nkambule, the investigating police officer in the case, told the court that on the 29<sup>th</sup> December 2006, he received a report

from PW1 of an assault with intent to cause Grievous Bodily Harm which had occurred at Gayinethi Area; the time was around 7 pm. He proceeded to the homestead of PW3 with two other police officers. They found PW1 who gave them a report of the incident. The first accused came over to the police and reported that the person with whom he was fighting had stabbed him.

[40] He told the court that after cautioning the first accused in terms of the Judges Rules, he led them to the Scene of Crime in the fields where they found the deceased; he was still alive but seriously injured. PW1 was also present. The deceased was severely injured on his head and he was subsequently taken to hospital together with the first accused who was stabbed.

[41] Subsequently, the three accused were arrested. The first and second accused, after being cautioned in terms of the Judges Rules, led the police to their homestead where they gave them a knobstick and a short spear with a rubber at the back.

[42] Thereafter, the third accused after being cautioned led the police to the homestead of PW3 where he pointed out a log next to the motor vehicle. He learned of the death of the deceased on the following day. Thereafter,



PW8 formally charged the three accused. The knobstick, the spear and the log were admitted in evidence as exhibits A, B and C respectively.

[43] PW8 further told the court that in the course of his investigations, he met PW6 at the Hlatikulu Government Hospital, and, she advised him that the deceased had come home with a cellphone but that it was not found in the possession of the deceased when he was admitted in hospital. The cellphone was eventually handed to him by PW7 who informed him that he had been given by the first accused for safe-keeping. PW6 had identified the cellphone as belonging to the deceased; and, she switched on the cellphone using a code and it started operating.

[44] Further investigations led PW8 to the first accused. After cautioning him, he searched him and found E170.00 (one hundred and seventy emalangeni) hidden in his underwear. He had failed to declare the money even though he was obliged to do so. The cellphone and the money were admitted in evidence and marked as exhibits "D" and "E" respectively.

[45] Under cross-examination, he confirmed that they found the deceased in the fields after being led by the first and second accused; the deceased was alive with injuries to his head. He further confirmed that there were many people who were arrested for this crime but after their investigations, only

the three accused were charged. He also confirmed that the first and second accused led them to their homestead where they gave them a spear and a knobstick; and, that King Simelane, a senior resident of the area, was present, together with the accused's grandmother, Thabiso Senzo Hlatshwako (PW5) and other family members. The first and second accused instructed PW5 to take the spear and knobstick from the house. PW8 reiterated that the third accused pointed out the log to the police, and, he denied as alleged that it was taken from a pile of logs within the homestead of PW3.

[46] PW8 told the court that the first accused had declared money in his possession except for the money that was hidden in his underwear. He reiterated that he had informed all the accused to declare their assets since this is a normal procedure when a person has been arrested.

[47] PW9 King Simelane, a resident of Gayinethi area told the court that the police asked him to accompany them to the parental homestead of the first and second accused. On their arrival at the homestead, they were introduced to Josephine Simelane; the police were accompanied by the three accused. The first and second accused alighted from the police van and entered the house; they came back with a spear and a knobstick, and,

they explained that the items were used in the commission of the offence. He identified the weapons in court.

[48] Three medical reports were submitted by consent as part of the Crown's evidence. Firstly, the medical report of PW4 shows injuries and swelling around the right eye. Secondly, the medical report of the first accused shows skin laceration of about five (5) centimetres. Thirdly, the medical report of the deceased shows that when he was admitted to hospital, he was blood-stained with multiple skin cuts on the skull as well as gross swelling of the skull.

[49] PW10 Sergeant Sibusiso Vilane testified that on the 29<sup>th</sup> December 2006 he was the Desk Officer at Hlatikulu Police Station under the Criminal Investigation Department (CID). He told the court that this matter was initially reported at Debedebe Police Post; and, that it was subsequently brought to Hlatikulu Police Station. He directed PW8 and another Police Officer called Ndzimandze to investigate the matter. Under cross-examination, he denied taking part in the investigations of the matter or torturing the accused as alleged. He further denied that the accused were assaulted by the police during the criminal investigation.

[50] The post mortem report was admitted by consent; and the cause of death was injury to the head. Three serious injuries were noted on the head, and, depressed fractures on three sides of the skull. There was extra-dural, sub-dural and intra-cerebral haemorrhage present.

[51] The first accused testified in his defence and told the court that in the evening of the 29<sup>th</sup> December 2006, at about 7 pm, they were sitting next to the homestead of PW3 playing with Mongi Sithole's cellphone; they were from a soccer training. At about 7 pm a cricket exploded about twenty five metres away from where they were sitting; and, they didn't see the person who was firing the cricket. The cricket exploded at the homestead of PW3 next to people sitting at the back of a bakkie drinking liquor at the homestead; two of the people were PW1 and PW2, both of whom he knew.

[52] The cricket exploded to the direction of the motor vehicle; the explosion produced a light which enabled them to identify Sibusiso Tito Ndlovu as the person who was playing with the cricket; he ran with the cricket to their direction, and, they ran to different directions away from the cricket to avoid being injured. The first accused ran to the nearby homestead of Gogo Mkhonta about ten metres away from where they were sitting. He was wearing a T-shirt which was similar to the one worn by Sibusiso Tito Ndlovu.

[53] The deceased pursued the first accused mistaking him for Sibusiso Tito Ndlovu, and, he shouted that he was not the person who had exploded the cricket. The deceased hit and kicked him and further stabbed him on the hand. He shouted for help and the group of boys came and stoned the deceased; but the first accused denied that he retaliated as alleged by PW7. On the contrary, he told the court that he cried and ran away. Among the people who stoned the deceased were Bhekithemba Simelane, Wandile Simelane, Melusi Simelane, Bongani Dlamini and others. His co-accused arrived after the deceased had been assaulted by the group of boys.

[54] The first accused then went to the homestead of PW3 to ascertain the extent of his injuries where there was light. Along the way he met the man who was sitting at the back of the bakkie with the deceased; he told him that the deceased had stabbed him, and, the man hit him with a bottle thinking he was the person who was carrying the cricket. The first accused retaliated and hit the man with the bottle and he fell on top of the firewood.

[55] He further reported to PW1 that the deceased had stabbed him, and PW1 in turn insulted him. Thereafter, he went home which is nearby and found PW5 and Mpendulo Mthethwa sleeping; and, he showed them the stab wound. He realized that he had to go to hospital, and, he took a knobstick and a spear to defend himself. Back at the homestead of PW3 he found

many people surrounding the motor vehicle; logs were placed in front and behind the motor vehicle to prevent it from driving away.

[56] He was shown the deceased who was seated inside the motor vehicle; he came closer to the motor vehicle and saw him. Bhekithemba Simelane took the knobstick and spear from the first accused; then he asked PW3 to give him money to go to hospital. The deceased came out of the motor vehicle and ran downwards to the fields. Many boys ran after him; and, he followed them and found the deceased lying on the ground surrounded by the group of boys.

[57] He never noticed the second and third accused amongst the group of boys. He was told that the deceased fell and had not been assaulted. He denied assaulting the deceased as alleged by PW7. Bhekithemba Simelane asked them to pick up the deceased and place him next to the path where there was a light so that the police could find him; PW7, Melusi Simelane and Siphon Simelane assisted Bhekithemba Simelane in carrying the deceased.

[58] They went to the homestead of PW3 but before they arrived, they saw a police van; he left the others and went home to fetch E179.60 (one hundred and seventy nine emalangeni sixty cents) so that he could go to the hospital with the police. Incidentally, he told the court that nobody saw him when

he arrived at home to take the money. Thereafter, he went back to the homestead of PW3.

[59] He explained to the police what had happened, and, the police asked him to show them the deceased; he led the police to the scene and the police took the deceased and the first accused to hospital. After treatment, the police took the first accused to Hlatikulu Police Station.

[60] On the following morning, he was driven home where his family was informed about his arrest; the police also wanted to arrest the other group of boys. After their arrest, the accused and the other boys were detained in two different cells; and, the first accused shared the same cell with the second and third accused, Bhekithemba Simelane, PW5 and Mongi Sithole. He further claimed that they were tortured by the police.

[61] Subsequently, on the 1<sup>st</sup> January 2007, the police again took him home; they wanted the spear and the knobstick. They took PW9 to his homestead where they found his grandmother sitting on the doorstep. He alighted from the police van and told PW5 to bring the weapons.

[62] He denied having assaulted PW4 with a log as alleged by PW1 and PW2; he further denied having told PW1 and PW2 that he had killed a dog

referring to the deceased. Similarly, he denied showing PW7 money when they were in police custody; he further denied that the money was found in his underwear as alleged by PW8. He denied knowledge of the cellphone or that he gave the cellphone to PW7. He further denied stoning the deceased or hitting him with fists or kicking him as alleged.

[63] Under cross-examination, he admitted that his family paid a cow to the family of the deceased; and, it was put to him that the reason was that he took part in the killing of the deceased. In response he denied these allegations. However, he admitted assaulting PW4 with a bottle after PW4 had also hit him with a bottle. He further admitted that the defence Counsel did not put to PW4 that he had been stabbed by the deceased or that the deceased thought it was him who had exploded the cricket as the reason why that he was attacked by the deceased.

[64] He conceded that the evidence of PW1 was not disputed that he went home to fetch his weapons after he had been stabbed and after the deceased had been assaulted and was lying inside the motor vehicle. He further admitted that PW3 persuaded him not to pursue the fight against the deceased to the extent that she offered to pay for his medical bills for the injury sustained. The first accused further conceded that upon his return from fetching his weapons, he asked for the deceased and was shown by the third accused



that he was inside the motor vehicle. It is apparent from the evidence that prior to his return, the group of boys did not assault the deceased but were standing surrounding the motor vehicle.

[65] The first accused denied that he assaulted the deceased together with the second and third accused in the fields after the deceased was forced out of the motor vehicle. PW7 had maintained that the three accused assaulted the deceased and only stopped when the group of boys arrived; and, that the third accused was armed with a log.

[66] The first accused did not dispute the evidence of PW8 that the money which he failed to declare was E170.000 (one hundred and seventy emalangeni) and not E179.60 (one hundred and seventy nine emalangeni sixty cents). The first accused had not declared the money when the police told him to declare his assets, and it was found in his underwear the following day.

[67] The second accused testified that he was sixteen years of age when the offence was committed; and, that they were from a gym. They were sitting with a group of boys next to the homestead of PW3. He left the group of boys at 7.30pm to drive cattle from the grazing land home; when he returned at 8 pm, he found the group of boys surrounding the motor vehicle,

and there was commotion. After making enquiries, he was advised that the first accused had been stabbed.

[68] He saw the deceased seated inside the motor vehicle. He went to the area where they were sitting with the group of boys to collect a gym outfit which he had hidden before he left to drive the cattle home. He heard people shouting, and when he returned, he discovered that it was the deceased who was running away; the group of boys were pursuing him. He followed them to the scene of crime where he saw PW7, Melusi Simelane, Siphon Simelane and Bhekithemba Simelane carrying the deceased to the side of the pathway; thereafter, they all left leaving the deceased by himself in the fields.

[69] On the following day the police arrived in the company of the first accused and collected the group of boys who were present the previous day at the homestead of PW3 including all the accused; they were taken to Hlatikulu Police Station where they were tortured by the police. Only the three accused were charged and the rest of the boys were released. The second accused denied assaulting the deceased as well as PW4 as alleged.

[70] Under cross-examination he admitted that the defence did not put to PW1 and PW7 that he was not present when the deceased was assaulted on the

first occasion and had gone to drive cattle home. Similarly, he admitted that it was not put to PW1 and PW7 that he was not present when the deceased was forced out of the motor vehicle and that he had gone to fetch his training outfit which he had hidden around PW3's homestead before he left to drive the cattle. He further admitted that his homestead was about two hundred metres away from the homestead of PW3; the Crown insisted that he could have put the training gym at home before fetching the cattle.

[71] The third accused testified that he was fifteen years of age when the offence was committed. He told the court that in the evening of the 29<sup>th</sup> December 2006 at about 8 pm, he was at home with his family. Her elder sister came from the main house and told them that there was commotion at the homestead of PW3; his home is closer to the homestead of PW3, and, they are neighbours. The distance between the two homesteads is about fifty metres apart.

[72] He testified that he left with his younger brother Khulekani Simelane to observe what was happening; it was dark and they could not identify all the people who were present at the premises of PW3. However, he was able to identify Mongi Sithole, Bongani Dlamini and Wandile Simelane; and, they were standing next to a motor vehicle. Mongi Sithole told him that the first accused had been assaulted. Suddenly he heard the door to the motor

vehicle being opened, and a person came out of the motor vehicle and ran away; however, the group of boys followed after him, but he remained behind with Bongani Dlamini, and subsequently went home.

[73] He was arrested the following day together with the group of boys who were present the previous day at the homestead of PW3. They were taken to Hlatikulu Police Station where they were interrogated, tortured and assaulted by the police with fists and open hands. The police accused him of damaging the motor vehicle by hitting it with a log; and he denied damaging the motor vehicle as alleged by PW1 and PW7. He argued that he was not present on the first occasion when the deceased was assaulted. He further denied that he opened the motor vehicle and forced the deceased to run away to the fields.

[74] Under cross-examination, he failed to explain why PW1, PW7 and PW8 could lie against him and fabricate the story; however, he did not deny that his father Mfaniselwa Simelane went to the homestead of the deceased to mourn the death of the deceased and to further comfort the deceased's mother.

[75] DW1 Nonhlanganiso Simelane, the sister to the third accused, testified that on the evening of the 29<sup>th</sup> December 2006, she heard a loud noise and

commotion at the homestead of PW3; she alerted her family about the said noise. Subsequently, they went to sleep leaving the third accused still awake in the house. In the next morning the third accused was arrested together with other local boys. Incidentally, under cross-examination DW1 admitted that she could not recall the time when she went to sleep as well as the date in relation to her evidence.

[76] DW2 Bhekithemba Simelane testified that in the evening of 29<sup>th</sup> December 2006, his brother Melusi Simelane arrived home from his workplace at Matsapha. He asked him to accompany him to the main home; along the way they met local boys, and, Melusi Simelane said he wanted to frighten them. He lit and fired a cricket, and, the boys ran away; others took the cricket and played with it.

[77] He left the local boys together with Melusi Simelane playing with the cricket. There was light, and, he identified PW7, Bongani Dlamini and Mongi Sithole as present on the scene; however, he did not identify the presence of the accused. On his way back, he heard noise and somebody raising an alarm. He went to the area where the noise had originated and met the first accused who told him that he had been stabbed by another man.

[78] The first accused showed him the man who had stabbed him lying down and being assaulted with stones by a group of boys including Mongi Sithole, PW7 and Siphon Simelane; he doesn't recall the other boys who were assaulting the man. The assault began at the homestead of PW3 and proceeded towards the neighbouring Dlamini homestead. Thereafter, PW4 came and took the man to the motor vehicle which was parked at the homestead of PW3.

[79] Suddenly the first accused came carrying a short spear and a knobstick and asked for the man who had stabbed him. He disarmed the first accused of the weapons and gave them to another boy to take them home; he could not recall the name of this boy.

[80] He confirmed that PW3 told the first accused to abandon the fight since she was willing to give him money for hospital expenses for his injuries. She further told the court that PW4 came bleeding and that PW1 and PW2 washed him.

[81] The man seated in the motor vehicle came out running; and, Melusi Simelane told them to pursue and catch the man. The first accused was present but he is not certain if the second and third accused were present. They pursued the man, and, Siphon Simelane and other boys showed him

where the man was lying facing down in the fields. He came closer to the man and noticed that he was breathing with difficulty. The man was lying helplessly and couldn't walk. The first accused, Melusi Simelane, PW7 and Mongi Sithole took the man to the side of the pathway where the police could easily find him.

[82] He was arrested the following day together with the other group of boys and detained at Hlatikulu Police Station. After interrogation he was subsequently released by the police.

[83] Under cross-examination DW2 denied recording a Statement with the police. He said the statement was written by the police; he alleged that the police tortured and assaulted him, asked him questions and recorded the statement. He told the court that the statement was not read back to him; he was merely asked to sign the statement. The statement implicated all three accused in the commission of the offence.

[84] DW3 Siphon Simelane is a brother to the third accused and a cousin to the first and second accused. He testified that on the 29<sup>th</sup> December 2006 he left home and went to the homestead of Lomagwaba Simelane; and, along the way, he heard noise at the homestead of PW3. He went there and found people surrounding a motor vehicle. After making inquiries he was

told that the first accused had been stabbed; the first accused later arrived from home carrying a spear and a knobstick. When he reached the motor vehicle, DW2 dispossessed him of the weapons.

[85] Thereafter, he heard noise and people shouting; the man had come out of the motor vehicle, and, he was running downwards. The group of boys ran after the man, and, he also ran after the man. He arrived first on the scene and found that the man had fallen. He was followed by DW2. The man was then taken by himself, PW7 and Melusi Simelane and placed him on the pathway so that the police could easily find him.

[86] DW 3 was evasive when giving evidence. He also denied that the man was assaulted in the fields and asserted that the man had hit a barbed wired. He told the court that PW7 searched the man for money but could not find it and that he only found a cellphone. However, he said he could not identify the cellphone. DW3 was arrested the following day with the rest of the boys. He recorded a statement with the police, and, the police were writing as he was talking; he denied that the statement reflected what he had told the police. He further told the court that the police did not read the statement back to him but merely asked him to sign it. Under cross-examination the Crown reminded him that DW2 had testified that he was one of the boys who had assaulted the deceased. The Crown further



reminded him that his defence Attorney had put to PW1 that he assaulted the deceased. He further alleged that prior to making the statement, the police assaulted and tortured him. The statement implicated the three accused in the assault and death of the deceased.

[87] The statement was sworn before a Commissioner of Oaths and duly signed by DW3. Similarly, the statement by DW2 was sworn before a Commissioner of Oaths and duly signed by DW2. All statements implicated the three accused in the assault and subsequent death of the deceased. Both statements were admitted in evidence as Exhibit 5 for DW2 and Exhibit 6 for DW3.

[88] The totality of the evidence shows that on the 29<sup>th</sup> December 2006 the deceased was seated at the back of the bakkie owned by PW4 together with PW1, PW2, Shakes Shabalala and PW4. This was at the homestead of PW3; and, they were drinking liquor. It is common cause between the parties that PW3 sells liquor at her homestead to members of the public.

[89] The three accused and a group of local boys were sitting outside the gate leading to the homestead of PW3; and, the boys were from a sports training session. The evidence shows that the cricket came with Melusi Simelane who lit it and, it exploded and flew towards the direction of the motor

vehicle. The deceased approached the group of boys and asked them why they had thrown the cricket at them; the group ran away and the first accused remained and was confronted by the deceased. A fight ensued between the first accused and the deceased; and, the deceased was stabbed. However, the injury that he sustained was not serious. He sustained a skin laceration of about 5 cm on his left hand. The medical report shows that he was treated on the 29<sup>th</sup> December 2006 at Hlatikulu Government Hospital.

[90] The rest of the group joined the fight on the side of the first accused and assaulted the deceased with kicks, fists and pelted him with stones until he fell; then they left him. The deceased was subsequently assisted by PW4 to walk back to the motor vehicle.

[91] The first and second accused also assaulted PW4 after he had assisted the deceased to board the motor vehicle. PW4 was assaulted with a log and he fell down and sustained severe injuries around his right eye. The Medical Report indicates that he was treated for his injuries on the 30<sup>th</sup> December 2006 at Hlatikulu Government Hospital.

[92] The first accused reported to PW3 that she had been stabbed and needed medical treatment; she agreed to give her the money but she advised him to

go home, and she undertook to take him to hospital the following day. The first accused left home and returned shortly carrying a knobstick and a short spear. PW3 again dissuaded the first accused and the other boys from attacking the deceased particularly because the first accused was not seriously injured. Her advice was ignored and she decided to go and sleep leaving them on the premises surrounding the motor vehicle.

[93] On his return, the first accused asked for the deceased and was shown by the third accused that he was inside the motor vehicle. The third accused hit the motor vehicle with a log and broke the window in the process; this forced the deceased to come out of the motor vehicle and run away. DW2 disarmed the first accused of the short spear and knobstick and gave the weapons to PW5 to take home.

[94] The three accused pursued the deceased and they were followed from behind by the group of boys. The deceased ran to fields where he was heavily assaulted by the three accused; the first accused was carrying a knobstick, the third accused was carrying a log. Melusi Simelane, DW2 and PW7 picked up the deceased and put him next to a pathway so that the police could easily find him. The deceased was left in the fields by himself to die; and no attempt was made by the accused or anyone within the group to report the matter to the police or to transport him to hospital.

[95] On their return to the homestead of PW3, the first accused declared that they had killed the dog which had stabbed him, referring to the deceased. PW1 and PW2 went down the fields to look for the deceased and they found him lying in the fields in a critical condition. They reported the matter to the police who arrived promptly and took the deceased to hospital. The defence does not dispute the Crown's evidence that the first accused actually led the police to the fields where they had left the deceased.

[96] A medical report was prepared by the Hlatikulu Government Hospital on the physical condition of the deceased on his arrival at the hospital. His clothing was blood-stained. He had multiple skin cuts on the skull as well as gross swelling of the skull. PW6 confirmed that she found the deceased in hospital on the 30<sup>th</sup> December 2006 in a critical condition, and that he later died on the same day.

[97] PW6 further testified that on the 31<sup>st</sup> December 2006, PW8 arrived at her homestead with a cellphone which she identified as that of the deceased. She switched the phone on and dialled the deceased's number 6251583, and, the phone rang; she had served the deceased's cellphone number. PW7 also testified that before the first accused approached the police who had arrived at the homestead of PW3, he gave him a cellphone to keep. PW7 further told the Court that the first accused had showed him an

amount of E170.00 (one hundred and seventy emalangeneni) when they were in police custody in the presence of Melusi Simelane, Eric Dlamini and Wandile Simelane.

[98] PW8 testified that the first accused after being cautioned led them to the scene of crime in the fields where they found the deceased; the deceased was still alive but he was seriously injured on his head. He was taken to hospital for treatment.

[99] PW8 further told the court that the first and second accused after being cautioned led them to their homestead where they gave him a spear and a knobstick. The third accused after being cautioned also led them to the homestead of PW3 where he pointed at a log. The log, the spear and the knobstick were subsequently admitted in evidence. PW9 corroborated the evidence of PW8 in respect of the spear and the knobstick handed to PW8 by the first and second accused.

[100] PW8 further told the court that PW7 handed to him a cellphone which he was given by the first accused. It was later identified by PW6 as belonging to the deceased.

[101] PW8 also told the court that after cautioning the first accused who was in police custody, he searched him and found money hidden in his underwear. He had not declared the money when he was detained even though the police had asked him to declare their possessions. The money and cellphone were subsequently admitted in evidence.

[102] PW10 testified that the police did not assault the accused as alleged. In addition, the defence did not during the cross-examination of PW8, mention that the accused were assaulted by the police. DW2 and DW3 were originally Crown witnesses but they subsequently became hostile and changed their statements and further refused to testify for the Crown; the Crown then abandoned them as its witnesses. They had made sworn statements before a Commissioner of Oaths, but they later denied making the sworn statements.

[103] The evidence of Crown witnesses is corroborative in all material respects including the evidence of the accomplice witness PW7. Section 234 of the Criminal Procedure and Evidence Act No. 67 of 1938 provides that an accomplice witness who is produced as such by a public prosecutor and submits to be sworn as a witness and fully answers all lawful questions put to him while under examination, he shall be freed and discharged from all liability to prosecution for such offence. PW7 has given a detailed analysis

of the commission of the crime including his role and that of the accused as well as the other boys within the group; he proved to be reliable and credible and not evasive. He is therefore freed and discharged from all liability to prosecution for the offence.

[104] Section 237 of the Criminal Procedure and Evidence Act provides that a Court trying any person on any charge may convict him of any offence alleged against him in the indictment on the single evidence of any accomplice provided that such offence has, by competent evidence, other than the single and unconfirmed evidence of such accomplice been proved to the satisfaction of such court to have been actually committed.

[105] I am satisfied that there is competent evidence which prove beyond reasonable doubt the commission of the offence other than the evidence of the accomplice witness. There is evidence by Crown witnesses that the accused assaulted the deceased on the first occasion with kicks, fists and pelted him with stones. There is sufficient evidence that the first accused went home and came back armed with a spear and knobstick much against the advice of PW3; he told her that he wanted to revenge for his stabbing by the deceased. Similarly, there is sufficient evidence that on his return from home, the first accused was angry and enquired the whereabouts of the

deceased. DW2 tried to disarm him as he advanced to the motor vehicle where the deceased was seated.

[106] The three accused attacked the deceased causing him to flee and run downwards to the fields; the accused pursued him. After a while they returned to the homestead of PW3 together with the other boys, and, the first accused was heard saying that they have killed the dog, referring to the deceased. This is in addition to the sworn statements by DW2 and DW3 which were admitted in evidence.

[107] *His Lordship Nathan CJ* in the case of *Mdluli and Others v. Rex* 1977-1978 SLR 83 (HC) at 84C stated the object of the cautionary rule against accomplice evidence in the following manner:

**“The rule operates in favour of the accused and against the Crown where the Crown is invoking the evidence of accomplice witnesses to secure the conviction of the accused. The object of the rule as has been pointed out in numerous cases – see, e.g. *Ncanana’s case*, supra, *R v. Mpompotshe and Another* 1938 (4) SA 471 (A), *S v. Hlaphezulu and Others* 1965 (4) SA 439 (A) - is to guard against the danger that the accomplice witness, who ex hypothesis has knowledge of the circumstances of the crime, will falsely incriminate an accused who did not participate in it at all. But the rule does not work in reverse.”**



[108] The Crown has also invoked the doctrine of Common Purpose as a basis for the criminal liability of the accused in respect of the charge of murder. *Moseneke J* as he then was, in the case of *S v. Thebus and Another 2003* (6) SA 505 (CC) at page 527 para 34 stated the following:

**“In our law, ordinarily, in a consequence crime, a causal nexus between the conduct of an accused and the criminal consequence is a prerequisite 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 consequence, 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 course of joint enterprise. 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 in the group contributed causally to the criminal result. Such a causal prerequisite for liability would render nugatory and ineffectual the object of the criminal norm of Common Purpose and make prosecution of collaborative criminal enterprises intractable and ineffectual.”**

[109] The decision of the South African Constitutional Court in *S v. Thebus and Another* (supra) follows a long line of cases decided by the South African

Supreme Court of Appeal. In *S v. Safatsa* 1988 (1) SA 868 (A) at 898 A-B, *Botha JA* stated the following:

**“In my opinion these remarks constitute once again a clear recognition of the principle that in cases of Common Purpose the act of one participant in causing the death of the deceased is imputed, as a matter of law, to the other participants.... It is well established that a Common Purpose need not be derived from an antecedent agreement, but can arise on the spur of the moment and can be inferred from the facts surrounding the active association with the furtherance of the common design.”**

[110] At page 889 E – F *Botha JA* stated the following:

**“Association in a common illegal purpose constitutes the participation – the *actus reus*. It is not necessary to show that each party did a specific act towards the attainment of the joint object. Association in the common design makes the act of the principal offender the act of all.... Moreover, it is not necessary to show that there was a causal link between the conduct of each party to the common purpose and the unlawful consequence.”**

[111] At page 900 H *His Lordship Botha JA* said the following:

**“That being the existing state of the law relating to Common Purpose, it would constitute a drastic departure from a firmly established practice to hold now that a party to a Common Purpose cannot be**

**convicted of murder unless a causal connection is proved between his conduct and the death of the deceased.”**

[112] In the case of *S v. Mgedezi and Others* 1989 (1) SA 689 (A) at pages 705-706, *His Lordship Botha JA* said the following:

**“In the absence of proof of a prior agreement, accused No. 6, who was not shown to have contributed 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 perpetuating 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 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.”**

[113] In *S v. Nzo and Another* 1990 (3) SA 1 (A) at 7C *Hefer JA* delivering the majority judgment stated the following:

**“In view of this clear evidence of the appellants’ continuing participation in the execution of the common design despite their**

**foresight of the possibility of the murder, they would appear to fall squarely under para (C) of the well known dictum in *S v. Madlala* 1969 (2) SA 637 (A) at 640 H to the effect that the parties to a common purpose are liable for every foreseen offence committed by any of them in the execution of the design if they persist, reckless as to its possible occurrence.... But, since liability cannot conceivably be imputed to every member for every foreseen crime so committed by all other members, the imputed liability of a member is limited to crimes with which he specifically associates himself. This is so because liability on the basis of the doctrine of common purpose arises from the accused's association with a particular crime and is not imputed to him where he associates himself, not with a particular crime, but with a criminal campaign involving the commission of a series of crimes. In such a case he can be convicted, apart from crimes in which he personally participated, only of those with which he specifically associated himself."**

[114] The South African decision on the doctrine of common purpose has been followed by our Supreme Court in cases such as the Criminal Appeal of *Mbabane Tsabadze and Sandile Dlamini v. Rex* case no. 29/2011 as well as in the case of *Mongi Dlamini v. Rex* Criminal Appeal case No. 08/2010, *Phillip Wagawaga and Others v. Rex* Criminal Appeal No. 17/2002.

[115] It is apparent from the evidence adduced by the Crown that the accused actively associated with the furtherance of the common design. Having regard to the above authorities, evidence led as well as submission by

Counsel, the accused are guilty of the crime of murder on the basis of the doctrine of common purpose by active association.

[116] The first accused is also guilty of Count 2 and Count 3. He pleaded guilty to both counts and the Crown accepted his plea. Section 238 of the Criminal Procedure and Evidence Act provides that where a person is arraigned before the High Court and has pleaded guilty to any offence other than murder, the Court may sentence him for such offence without hearing any evidence.

[117] The defence has raised two factors as constituting extenuating circumstances. Firstly, the youthfulness of the accused. It was argued that when the offence of murder was committed, the first accused was twenty years of age, the second accused was sixteen years of age and the third accused was fifteen years of age. Secondly, the defence argued that the offence was committed by a mob and that there was no premeditation to commit the offence. Thirdly, it was submitted that the first accused acted under provocation. Fourthly, it was submitted that the deceased stabbed the first accused even though he was not the person who was firing the crickets.

[118] It is trite law that extenuating circumstances relate to facts bearing on the commission of the crime and which reduce the moral blameworthiness of

the accused as distinct from his legal culpability. The facts must not be remote or indirectly related to the commission of the offence and should be capable of reducing the moral blameworthiness of the accused; furthermore, the said facts should have a bearing on the accused's state of mind in doing what he did. The onus of proving the existence of extenuating circumstances rests upon the accused. See the cases of *S v. Letsolo* 1970 (3) SA 476 (AD) at 476 G-H; *Philemon Mdluli and Others v. Rex* 1970-1976 SLR 69 at 75D (HC); *Mbuyisa v. Rex* 1979-1981 SLR 283 at 285E (CA); and lastly *Rev v. Enos Khumbula Shongwe* 1977-1978 SLR 60 at 61F (HC).

[119] It is settled that youth alone does not constitute an extenuating circumstances unless it is combined with other factors to the extent that it has an effect on the accused's mind and emotion. See the cases of *Nkosi Sifiso v. Rex* 1987-1995 (4) SLR 303 at 309F; *Rennie Bernard v. Rex* 1987-1995 (1) SLR 201 at 207h (CA).

[120] I accept the fact that the accused were relatively young during the commission of the offence. Similarly, I accept that the accused were provoked. The accused and a group of boys were sitting next to the homestead of PW3 when Melusi Simelane arrived and exploded the crickets. It is common cause that the cricket was fired to the direction of

the motor vehicle where the deceased and his companions were seated at the back of the bakkie.

[121] The deceased enquired from them why they were throwing the crickets to their direction; the group of boys seeing the angry deceased approaching them decided to run away. It is not in dispute that the deceased caught up with the first accused who was wearing similar clothes to those worn by Melusi Simelane and that the deceased attacked him mistaking him for Melusi Simelane. A fight ensued resulting in the stab wound sustained by the first accused. The group of boys returned and assisted the first accused in the fight; and, the deceased was severely assaulted and had to be assisted by PW4 to walk back to the motor vehicle. In the circumstances the accused are convicted of murder with extenuating circumstances.

[122] The defence made submissions on mitigation of sentence firstly, that all accused persons are first offenders. Secondly, that the first and second accused were in custody for seven months before they were granted bail, and the third accused was in custody for two months before he was granted bail. Thirdly, that the first accused is sickly and suffering from asthma; fourthly, that the first accused has one (1) minor child to support and the second accused has two minor children to support. Fifthly, that the third accused is doing Form III at Ebenezer High School.

[123] The Crown also addressed the Court and asked for severe sentences because a human life was lost, and that the only solace for the family of the deceased was a heavy sentence which would act as a deterrent to other would-be offenders.

[124] I have considered the triad carefully, that is, the personal circumstances of the accused, the interests of society as well as the seriousness of the offence. In view of the existence of extenuating circumstances, the accused are sentenced fifteen years imprisonment in respect of the murder charge. For the second and third counts, the first accused is sentenced to two years and six months imprisonment respectively; the sentences will run concurrently with the sentence on the first count. The period spent by the first and second accused in custody for seven months will be taken into account in computing the period of imprisonment; similarly, the period of two months spent by the third accused in custody before bail will also be taken into account in computing his period of imprisonment.

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**M.C.B. MAPHALALA**  
**JUDGE OF THE HIGH COURT**

For the Crown  
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