IN THE HIGH COURT OF SWAZILAND

Criminal case No. 108/12

In the matter between:

REX

VS

SIMANGA MABASO

Neutral citation: *Rex vs Simanga Mabaso (108/2012) [2012] SZHC 184 (2013) 16th August 2013*

CORAM MCB MAPHALALA, J

Summary

Criminal law – the accused is charged with murder on the basis of the doctrine of common purpose – the essential requirements of the doctrine discussed – accused's contention that he did not execute the fatal blow cannot stand in view of the doctrine of common purpose – accused accordingly convicted of murder and sentenced to twenty five years imprisonment.

Judgment - Sentence
16 August 2013

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[1] The accused is charged with murder, and, it being alleged by the Crown that upon the 7th August 2010 at Nhlangano Town in the Shiselweni region, the accused with one Bheki Simelane who is still at large, acting jointly and in furtherance of a Common purpose unlawfully and intentionally killed Sizwe Ngwenya.

[2] PW1 Dr. Komma Reddy is employed as a police Pathologist by the Government of Swaziland since 2001 and based at the Police Headquarters. He testified that on the 11th August, 2010, he examined the body of the deceased, whose reputed age was twenty years. His body was identified by a police officer identified as Force No. 3165 as well as his father Phillip Ngwenya. According to the doctor, the deceased died due to multiple injuries.

[3] The deceased's body had lacerated wounds on the left parietal eminence of the head, lacerated wound on the middle portion of the back-side of the head, lacerated wound and contusions on the right cheek, abrasion on the thumb of the right hand, abrasion of the thumb of the left hand, contusions on the abdomen. In the skull there was parietal bone and occipital bone fractured; extra-dural, sub-arachnoid and intra-cerebral haemorrhage present. The mediastinum and thymus on the chest cavity were ruptured as well as the liver, gallbladder, biliary passages and spleen. The lungs, pancreas as well as the right adrenals were congested.

[4] Under cross examination PW1 confirmed that the injuries were fresh and that all the injuries were fatal. The Report on Post-mortem examination was admitted in evidence and marked Exhibit 1.

[5] PW2 is Thokozani Mdluli, aged twenty four years and residing in Durban, South Africa. He testified that he was born in Nhlangano and that he was currently employed at Mondi Forests in South Africa. In 2010 PW2 was residing in Nhlangano and employed as a Taxi driver. In the evening of the 7th August 2010, at about 2300 hours, he was sitting inside his taxi with Nkosinathi Hlatshwayo; they heard a car bang, and, they came out of the taxi and saw the accused and another man assaulting the deceased. They knew the accused as well as the deceased; and, they did not know the third man. The accused and his friend were throwing bottles and stones at the deceased, and some of the missiles thrown hit a kombi parked next to where the deceased was standing.

[6] The deceased ran towards the Nhlangano Police Station; later, they saw the deceased lying down next to the pedestrian police gate; the deceased was being attacked by the accused and his friend, kicking and assaulting him. Thereafter, they ran away. PW2 and Nkosinathi Hlatshwayo ran towards the deceased; he was severely injured with a swollen face, and you could not easily identify him. He was also bleeding profusely; Nkosinathi Hlatshwayo tried to chase after the assailants in his motor vehicle but to no avail.

[7] PW2 reported the incident to the police who subsequently took the deceased to Nhlangano Health Centre; PW2 and Nkosinathi Hlatshwayo drove behind the police van. PW2 knew both the accused and the deceased; they attended the same school, and they all grew up together.

[8] Under cross-examination PW2 maintained his evidence, and, he appeared to be a very reliable witness. He denied that the deceased was the aggressor or that he assaulted the accused and his friend. PW2 further denied that he was drunk when the assault took place. He was told by the Defence Counsel that the other boy accompanying the accused was Bheki Simelane; and it was put to him that it was Bheki Simelane who hit the deceased with a stone. However, he reiterated his evidence that the deceased was assaulted by both the accused and the said Bheki Simelane; thereafter, they ran away.

[9] PW3 is the father of the deceased; he identified the body of the deceased at the mortuary during the post-mortem examination held at the Mbabane Government hospital. During the cross-examination, the Defence Counsel merely told PW3 that he has been instructed by the accused to apologize to him for what befell the deceased.

[10] PW4 Detective Constable Sibusiso Hlatshwayo is the investigating officer in this case, and, he testified that his investigations found that the suspects were the accused as well as Bheki Simelane who was at the time of commission of the offence residing at Mathendele Township. On the 29th February 2012, Constable

Jabulani Mhlanga handed the accused to PW4. He introduced himself to the accused and further cautioned him in terms of the Judges Rules; the accused was subsequently charged with the murder of the deceased. The accused opted to make a Statement before a Judicial Officer; a police officer from the General Duty was asked to accompany him to the Magistrate's Court in Nhlangano. PW4 explained that it took about two years to arrest the accused because he was evading arrest.

[11] Under cross-examination PW4 maintained his evidence. He further told the Court that from his investigations he found that the accused and Bheki Simelane killed the deceased by kicking and hitting him with fists. He further told the Court that after the incident, the accused fled and relocated to Piet Retief in South Africa where he was employed in a Supermarket; however, he was subsequently deported back to the country by the South Africa government.

[12] PW5 is Nkosinathi Lucky Hlatshwayo, and, he works as a Kombi driver at Secunda in South Africa, he was born at Nhlangano in Swaziland. In 2010 he was employed as a taxi driver in Nhlangano, and on the 7th August 2010, he was parked outside the Phoenix Hotel in Nhlangano; he was with PW2. They heard a bang, and, they went out of the motor vehicle; they saw the accused and his friend assaulting the deceased, and, chasing him towards the Nhlangano Police Station. The deceased fell down but, they continued assaulting him; the deceased did not rise up after the assault.

[13] PW5 drove his motor vehicle and pursued the accused and his friend as they fled the scene; this was after the accused and his friend had hit his motor vehicle with a bottle and further assaulted the deceased. However, he could not find them. He confirmed that it was the accused and his friend who had assaulted the deceased. He further confirmed that PW2 is the one who reported incident to the police.

[14] After pursuing the accused and his friend, he went back to the scene; he discovered that the police had conveyed the deceased to Nhlangano Health Centre. He drove with PW2 and followed the police to hospital to check on the deceased. The deceased was seriously injured on the face.

[15] Under cross-examination PW5 told the Court that the bang came from his motor vehicle which was hit by a beer bottle; he further confirmed that two kombis were damaged during the assault on the deceased. Generally, he maintained his evidence under cross-examination. When it was put to PW5 that the deceased was assaulted by Bheki Simelane and that the accused merely kicked him twice on his feet when he was lying on the ground, PW5 denied that and reiterated that the deceased was assaulted by both the accused and his friend.

[16] During the defence case the accused testified that he was twenty two years of age and that he was staying at Mathendele Township. He conceded that he was employed at Pick & Pay Supermarket in Piet Retief after the incident. On the day of commission of the offence they were drinking liquor at Phoenix bar with

Bheki Simelane; then the deceased accused him of spilling his beer and further hit him with an open hand. He further told the Court that the deceased further took out a knife and pulled him by his clothes. A security guard took them out of the bar and told them to stop fighting; Bheki Simelane came and separated them. He ran to the Park; and his shirt was torn. The deceased and his friend chased after him; but they subsequently abandoned the chase.

[17] Bheki Simelane called him and he went back to the bar; the deceased started the fight again at the entrance to the bar, and, they ran away. The accused further told the Court that as they ran away from the deceased, he threw bottles at them. Bheki Simelane called him and he returned to the scene only to find the deceased lying on the ground next to the pedestrian gate at the Police Station. He found Bheki Simelane kicking the deceased, and, he only kicked him on his feet. Meanwhile the deceased had ten friends who were watching the assault but not assisting the deceased.

[18] The accused further testified that he pulled Bheki Simelane in an attempt to stop him from assaulting the deceased; and, inturn Bheki Simelane hit him with an open hand. He left the scene and was shortly followed by the Bheki Simelane. The accused denied that he fled the country after the incident, and, alleged that he was already working in South Africa when the incident occurred. He told the Court that he was on a weekend visit at home when the incident occurred. However, this contradicts the evidence of PW4 who testified that after the

incident, they went to the homestead of the accused, found his apartment unlocked and all his belongings removed save for a bed; and, the accused's sister told them that he had left. The sister never alluded to the fact that the accused was already employed in South Africa. The evidence that the accused had fled the country after the incident was never challenged by the defence.

[19] Under cross-examination it was not put to PW2 or PW5 that there were other people who were in the company of the deceased when he was being assaulted. The Crown further reminded the accused that the Defence Counsel did not put to PW2 and PW5 that the accused did not assault the deceased. Similarly, the Crown further reminded the accused that PW2 and PW5 had testified that they saw him and Bheki Simelane fleeing the scene after assaulting the deceased. The accused denied assaulting the deceased and put the blame on Bheki Simelane; he further denied that they were chased by PW5 as they left the scene. However, he admitted, that they left the deceased lying helplessly on the ground, and, that they did not assist him; he further admitted that he did not report the incident to the police because it didn't concern him.

[20] The accused told the Court that he learnt of the death of the deceased when he was arrested by the Police in Piet Retief, South Africa; the police further told him that he had fled the country and evaded police arrest after killing the deceased. He admitted that he was subsequently deported from South Africa back into

Swaziland and that he was handed over to the Swaziland Police at Mahamba Border Post.

[21] It is apparent from the evidence adduced that the deceased died as a result of being assaulted by the accused and Bheki Simelane with stones, fists and kicks all over his body. The accused does not deny that he assaulted the deceased together with Bheki Simelane or that the deceased fell to the ground upon being struck with a stone by one of them. It is also not in dispute that the accused and Bheki Simelane were the only people who assaulted the deceased before he died.

[22] PW2 and PW5 were eyewitnesses to the incident and they corroborated each other with their evidence on the sequence of events. It is common cause that the accused did not put his defence to the Crown witnesses. It is only when he gave evidence in-chief that the accused disclosed for the first time that he was provoked by the deceased who had split his beer; and, that the deceased subsequently hit him with an open hand, took out a knife and manhandled him, and, that Bheki Simelane and himself were later chased by the deceased and his ten friends.

[23] It is trite law that an accused person must put his defence to Crown witnesses in order for the Court to appreciate their response; a failure to do so is considered to be an afterthought. In the case of *S. v. P* 1974 (1) SA 581 RAD at p. 582, *MacDonald JP* stated the following:

"It would be difficult to over-emphasise the importance of putting the defence case to prosecution witnesses, and, it is certainly not a reason for not doing so that the answer will almost certainly be a denial. The Court was entitled to see and hear the reaction of the witnesses to the vitally important allegation that the appellant was not even in possession of red sandals on the two occasions he was alleged to have worn them at the river. Quite apart from the necessity to put this specific allegation, there was, in my opinion, a duty to put the general allegation that there had been a conspiracy to fabricate evidence. It is illogical for counsel to argue that there is a sufficient foundation in fact for a submission that the possible existence of such a conspiracy is such as to cast doubt on the whole of the State case but insufficient fact on which to cross-examine the principal state witnesses. The trial Court was entitled to see and hear their reactions to an allegation that they had conspired with the persons and for the reasons mentioned in the course of the trial. They may have been able to satisfy the Court that an opportunity to enter into such a conspiracy never existed. So important is the duty to put the defence case that, practitioners in doubt as to the correct course to follow, should err on the side of safety and put the defence case, or seek guidance from the Court."

[24] The principle enunciated in the above case of S. *v. P.* (supra) at p. 582 was adopted and followed by *Chief Justice Hannah in Rex v. Dominic Mngomezulu and Others* Criminal Case No. 94/1990 at p 16 of the judgment where he said the following:

"Counsel for the defence is, therefore, under a duty to put the defence to prosecution witnesses….

It is, I think, clear from the foregoing that failure by counsel to cross-examine on important aspects of a prosecution witness's testimony may place the defence at risk of adverse comments being made and adverse

inferences being drawn. If he does not challenge a particular item of evidence, then an inference may be made that at the time of cross-examination, his instructions were that the unchallenged item was not disputed by the accused. And if the accused subsequently goes into the witness box and denies the evidence in question, the Court may infer that he has changed his story in the intervening period of time. It is also important that counsel should put the defence case accurately. If he does not, and the accused subsequently gives evidence at variance with what was put, the Court may again infer that there has been a change in the accused's story."

[25] During closing arguments, the defence made mileage of the fact that the Amended Charge Sheet was not handed to the Chief Justice in accordance with section 88 bis of the Criminal Procedure and Evidence Act No. 67 of 1938. The section provides as follows:

" 88 bis. (1) The Chief Justice may, on an ex parte application made to him in chambers by the Director of Public Prosecutions and on being satisfied that it is in the interests of the administration of Justice so to do, direct that any person accused of having committed any offence shall be tried summarily in the High Court without a preparatory examination having been instituted against him.

(2) Such summary trial in the High Court may be held at a time and, place, determined by the Chief Justice.

(3) The Director of Public Prosecutions shall not less than four (4) days before the commencement of such summary trial cause to be served on the accused a copy of the charge upon which the accused is to be arraigned together with a brief summary of the substantial facts alleged against the accused as they appear from the statements of the witnesses for the prosecution against the accused, and a list of

the names and addresses of the witnesses he intends calling at the summary trial on behalf of the prosecution:

Provided, further, however, that the omission of the name or address of any witness from such list shall in no way affect the validity of the trial.

(4) This section shall apply in respect of any offence committed before or after the commencement of this Order."

[26] It is apparent from the evidence that the Crown did comply with the provisions of section 88 bis of the Act. The Chief Justice, upon an ex parte application made to him in chambers by the Director of Public Prosecutions, directed that the accused should be tried summarily at the High Court without a preparatory examination having been instituted against him. The Director of Public Prosecutions further served the charge upon the accused as required by the Act; the charge did have a list of Crown witnesses together with a brief summary of the substantial facts alleged against the accused as they appear from the statements of witnesses for the prosecution.

[27] The defence has argued that the amended charge sheet should not have been put to the accused without following the procedure set out in section 88 bis of the Act and that the procedure should be done *de novo*. Such a submission is absurd and it is not supported by the law. It is sufficient to note that in the earlier charge the accused was the only person charged. In the second charge, the accused is alleged to have acted jointly and in furtherance of a Common Purpose

with Bheki Simelane who is at large. Other than the allegation of a Common Purpose, the two charges are substantially the same.

[28] There is no requirement in law that when the Crown submits an amended charge, the procedure outlined in section 88 bis should be commenced de novo. It suffices that when the amended charge sheet was read out to the accused, neither the defence counsel nor the accused objected to the charge. It is only when counsel submitted closing arguments that the objection was raised. Similarly, the defence did not ask for more time to take instructions on the matter. The Crown witnesses gave their evidence and were equally cross-examined by the defence. When the Crown's case closed, the accused gave his own evidence. The defence did not suffer any prejudice at all. The test whether or not an amendment should be allowed if there is an objection, is the existence of a possibility that the accused might be prejudiced in his defence. See the case of *S. v. F.* 1975 (3) SA167 (TPD) at p.170.

[29] The accused admitted kicking the deceased. For purposes of Common Purpose, it doesn't matter which of them inflicted the fatal blow. What is required is that they were in active association with each other and the action of the one is imputed to the other. In *S. v. Mgedezi and Others* 1989 (1) SA 687 (AD) at pp 705-706, *Botha JA* said the following:

> **"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 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 …. In order to secure a conviction against accused No. 6, in respect of the counts on which he was charged, the state had to prove all these prerequisites beyond reasonable doubt."

[30] The decision in *S. v. Mgedezi* (supra) was approved and followed by the South African Constitutional Court in *S. v. Thebus* 2003 (b) SA 505 (CC) at para 18 and 19 *Moseneke J* said the following:

"18. The doctrine of common purpose is a set of rules of the common law that regulates the attribution of criminal liability to a person who undertakes jointly with another person or persons the commission of a crime. Burchell and Milton (at 393) define the doctrine of 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 specific criminal conduct committed by one of their number which falls within their common design. Liability arises from the common purpose to commit the crime.'**

Snyman (Criminal law 4th ed. at 261) points out that the essence of the doctrine is that if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others. These requirements are often couched in terms which relate to consequence crimes such as murder.

19. The liability requirements of a joint criminal enterprise fall into two categories. The first arises where there is a prior agreement, express or implied, to commit a common offence. In the second category, no such prior agreement exists or is proved. The liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind."

[31] At para 34 His Lordship dealt with a causal nexus between the conduct of an accused and the criminal consequence. He stated the following:

"34. 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 common purpose is to criminalise collective criminal conduct and thus to satisfy the social need to control crime committed in the course of 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 of a particular person in the group contributed causally to the criminal result. Such

a casual 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."

[32] It is apparent from the above authorities and the evidence adduced that the accused together with Bheki Simelane acting jointly and in furtherance of a common purpose unlawfully and intentionally killed Sizwe Ngwenya. When they assaulted the deceased repeatedly with fists, kicks, and stones, they appreciated that the assault might result in his death but they acted recklessly as to whether such death resulted; they continued assaulting the deceased even after he had fallen to the ground. *Hannah CJ* in *Mazibulo Vincent v. Rex* 1982-1986 SLR 377 (CA) at p. 380 said:

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

[33] *Dendy Young JA* in *Maphikelela Dlamini v. Rex* 1979-1981 SLR 195 (CA) at 197 said:

"As I understand the law in Swaziland, the South African concept of *dolus eventualis* has been stated this way: if the assailants realises that the attack might cause death and he makes it not caring whether death occurs or not, that constitutes *mens rea* or the intention to kill. And the way this test has been applied is whether the assailant must have realised the danger to life."

[34] The accused foresaw the possibility that the assault upon the deceased might cause the deceased's death but he acted recklessly whether or not death resulted. Accordingly, I find the accused guilty of murder.

[35] The defence has urged the Court to find extenuating circumstances exist in this matter on the basis that the accused has been drinking alcohol at the phoenix bar for the whole day; and, on the basis that he was provoked by the deceased. However, there is no evidence that the accused was intoxicated; hence, this point cannot succeed. Similarly, there is no evidence that the deceased had provoked the accused at all; on the contrary, the evidence shows that it's the accused and his friend Bheki Simelane who had assaulted the deceased leaving him critically injured and lying helplessly on the tarmac.

[36] Thereafter, they ran away from the scene; and, they did not afford the deceased medical assistance. The deceased was assaulted next to the Nhlangano Police Station. After the incident the accused fled the country to South Africa in order to evade arrest; however, he was deported back into the country by the South African Police. It is the evidence of PW4 Detective Constable Sibusiso Hlatshwayo that it took about two years to have the accused arrested because he was evading arrest.

[37] Admittedly, he accused is a young person; however, it is trite law that youth alone cannot be an extenuating circumstance unless it is shown that when

combined with other factors it had an effect on the accused's state of mind and emotions. See *Rex v. Mongi Dlamini* Criminal Trial No. 407/2007 at para 47; *Nkosi Sifiso v. Rex* 1987-1995 (4) SLR 303 at 309; *Rennie Bernard v. R.* 1987-1995 (1) SLR 201 at 207 (CA); *Mbhamali v. Rex* 1987-1995 (3) SLR 58 at 62 (CA). No. extenuating circumstances exist in this matter.

[38] In mitigation of sentence, the accused contends that he was nineteen years of age at the time of commission of the offence, that he has one child to support, and, that he has shown remorse on the ground that he co-operated with police investigations. He was arrested on the 27th February 2011. The accused was granted bail, but, he could not afford it; and, consequently, he has been in custody since his arrest.

[39] It is well-settled that the imposition of sentence is guided by the triad, that is, balancing the personal circumstances of the accused, the seriousness of the offence as well as the interests of society. *Lord Coulsfield JA* in the Botswana case of *Ntesana v. the State* (2007) 1 BLR 387 (CA), at 390, he said:

> **"One of the fundamental principles of justice in sentencing is that the Courts should strive to impose the right sentence for the particular circumstances of the case."**

[40] It is apparent from the evidence that the accused and his friend Bheki Simelane attacked the accused without lawful justification and assaulted him all over the

body with fists, kicks and stones until he was critically injured. No evidence of provocation by the deceased has been established. Certainly this is a serious case where a human life was lost unnecessarily. However, I will take into account the triad in arriving at a just sentence.

[41] I have decided to exercise my discretion in terms of section 15 (2) of the Constitution of 2005 and not impose the death penalty. Subsection (3) lays down a minimum sentence of twenty-five years where the Court has exercised its discretion in terms of subsection (2).

[42] Accordingly, the accused is sentenced to twenty-five years imprisonment backdated to 27th February 2011.

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M.C.B. MAPHALALA

JUDGE OF THE HIGH COURT

For the Crown — Principal Crown Counsel S. Fakudze
For the Defence — Attorney Mbuso Simelane