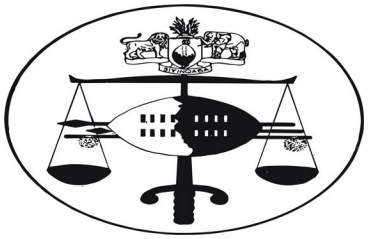

IN THE HIGH COURT OF SWAZILAND
JUDGMENT

REPORTABLE
Case No. 296/11

In the matter between

REX

and

MZWANDILE MZWAKHE DLAMINI
MANQOBA KOBAS ZWANE
MLUNGISI MLUNGU DLAMINI

Neutral Citation:	*Rex v Mzwandile Mzwakhe Dlamini & 2 others* (296/11) [2013] SZHC 93 (18 April 2013)
Coram:	**Mamba J**
Heard:	**23,24,25 October 2012, 18,19,21 February & 18th March 2013**
Delivered:	**18th April 2013**

[1] Evidence – admissibility thereof – accused making confession or disclosures to their friend and confidant – such admissible.

[2] Criminal law – liability of accused – doctrine of common purpose – liability of accused assessed individually and where common purpose established no need to establish who amongst several accused inflicted fatal blow.

[3] Practice and procedure – need for defence to put its case to crown witnesses restated and emphasized.

[4] Criminal law – murder – mens rea – accused forseeing that their actions might cause the death of the deceased but acting reckelessly not caring whether death occurs or not – guilty of murder on grounds of indirect intention.

[1] On the first count the first and second Accused (hereinafter referred to as A1 and A2 respectively) are accused of the murder of Simanga Nkambule (hereinafter referred to as the deceased). The crime is said to have occurred near the Mavuso Trade Centre in Manzini on 16th July 2011.

[2] The second count alleges that all three accused persons are guilty of the crime of robbery in that they allegedly robbed Mr Siboniso Tsabedze of various personal items on 16th July, 2011 near the Central Filling Station in Manzini. The crown alleges further that the accused persons were acting in the furtherance of a common or shared purpose when they committed these crimes.

[3] The third accused, Mlungisi Mlungu Dlamini, shall hereinafter be referred to as A3.

[4] On being arraigned on 23rd October, 2012, the accused pleaded not guilty on all counts. The crown led evidence of thirteen witnesses in the quest to establish its case. I examine this evidence in the next segment of this judgment.

[5] The evidence of PW1 (Magistrate Dumisa Mazibuko), PW2 (Magistrate Sindisile Zwane) PW10 (5202 Constable Meshack Mkhwanazi) and PW13 (Court Interpreter Pretty Nxumalo), was the subject of the *voire dire* conducted herein. The ruling on the admissibility or otherwise of the statements made by A1 and A2 to PW1 and PW 2 respectively, was handed down on 21st February, 2013. The court having ruled that these statements were not shown or proven to be admissible, the evidence of the four witnesses referred to herein is largely irrelevant for purposes of this judgment.

[6] On 16th July, 2011, Ncamiso Soko, who gave evidence as PW3, left the home of A1 at Eticantfwini, in Manzini together with the accused persons. They were headed for the Manzini City Centre where A1 wanted to make certain purchases for himself. In the City, they visited *inter alia* the Cheapest Tailor Shop, where A1 bought a belt. They also visited S and S bar where they purchased liquor. They left the said bar just after 6 pm and were drinking the liquor as they walked home.

[7] Apparently, in order to get home, they had to cross the Mzimnene River and pass the Grand Valley bar. Before they got to the said river, this witness noticed that he had an okapi knife in his pocket. He said this surprised him as he had last used the knife the previous day when he had

assisted his grandfather to kill and skin a goat at home. He, apparently alerted his companions about the presence of the knife. A2 got interested in it and asked him to hand it over to him which he did.

[8] Before the quartet got to the Grand Valley bar, they notice a young man walking behind them in the same direction they were walking. He eventually passed them. He wore a red sweater, blue jean trousers and black shoes. This witness is said to have remarked to his companions that this young man looked familiar to him as he resembled or looked like someone he knew from near the Manzini Central School near William Pitcher College.

[9] Before PW3 and the accused reached the Grand Valley bar, they split or separated. PW3 went into the bar to buy cigarettes whilst the 3 accused went to the nearby petrol filling station to buy food from the take-away outlet there.

[10] PW3 testified that he left the said bar after 7 pm and went to wait at the traffic lights nearby for the accused persons. He waited there for about fifteen minutes and when the accused did not come he started on his journey home as he thought the accused persons had also proceeded on their way to Eticantfwini (home). Near the Mzimnene river, he was joined

by A3 who told him that he had left A1 and A2 at the Petrol Filling Station. Together they walked to the home of a friend Sibusiso Nkambule (PW12) where they set and watched a movie on Television before going to the home of A1.

[11] They found both A1 and A2 at A1's home. These accused persons, ie A1 and A2 informed them that they had robbed two people on their way home. A2 also told them that their second victim had tried to resist or had offered some resistance to the robbery and had in the process been accidentally stabbed by them ie A1 and A2. A3 then told this witness that one of the persons who had been mugged was the person they had seen before they separated near the Grand Valley bar. He said this person had been robbed of his shoes, sweater and Nokia cellular Telephone. The rest of the accused confirmed this and also revealed that the second victim had been mugged by A1 and A2 only. These items, ie, black with white stripes adidas canvas shoes (with red sole), red (hooded) sweater, 7210 Nokia Cellular Telephone and 1200 Nokia Mobile telephone were shown to him. It is common course that those items were handed in court as exhibits 1 to 4 respectively by PW11, 5879 Detective Constable Welile Muzi Simelane. PW3 said he could only identify the 1200 Nokia mobile telephone (Exh 4) which he proceeded to identify in court and not exhibit 3.

[12] Under cross examination PW3 conceded that he could not positively say that the items of clothing he said were worn by the person seen near the Mzimnene river were the very items exhibited in court or seen by him at the home of A1 on the night in question. He said, they were, however, similar in every respect.

[13] PW5, Siboniso Tsabedze is the victim on count 2. He told the court that on the night in question he was on a foot path slowly walking home when he noticed three people closely following him. Suddenly one of them got in front of him, grabbed him by his cloths insulted him and threatened him with a knife. The man wielding the knife demanded or ordered him to take off his shoes and cloths whilst the other two men searched his person. They managed to find a Nokia 7210 in one of his pockets. They finally took this telephone, (exhibit 3), exhibit one and exhibit 2 from him against his will and wishes. He submitted to the taking of these items out of fear of being stabbed with the knife that was being wielded in his face. After taking these items from him, the 3 men disappeared into the dark in different directions. He proceeded on his way home.

[14] PW5 was candid enough to tell the court that he was unable to identify his attackers because it was dark at the time he was attacked. He was, however, able to identify his property before the police and in court. None

of the accused challenged his identification of them. Each of course denied being the robber. (I deal with the evidence of each accused later in the judgment.)

[15] I pause here or digress from the narrative and note that from the above unchallenged evidence of Siboniso Tsabedze, the crown has proven, beyond any reasonable doubt that the crime of robbery was committed as alleged in count two. What of course remains to be established is who committed this offence.

[16] Another witness who testified for the crown was Ndumiso Mamba (PW7). Like most of the crown witnesses and the accused herein, he was residing at Eticantfwini area at the relevant time. Because his house had been burnt down, he spent the night of 16th July 2011 at the home of A1. That night, whilst already in bed, A1 and A2 returned home. They appeared drunk and switched on the radio in the house and this woke him up. A2 was wearing a sweater which had a hood and A1 was wearing a pair of adidas canvas shoes or sneakers which had the adidas logo or badge on them. He said he was seeing these items for the first time in the possession of the Accused but as he did not find anything amiss in this, he did not question the Accused on these items. He confirmed the presence of A3 and Pw3 in the house as well.

[17] The evidence of PW7 was not disputed by any of the accused persons.

[18] PW8, Dumsile Dludlu ran or operated a small or spaza shop in the Mzimnene area in Manzini. She told the court that three boys came to her shop and told her that they were hungry. They pleaded with her to give them bread and cigarettes on credit and when she refused, they offered to pledge or leave a Nokia 1200 mobile telephone with her as security for the debt. She agreed and the boys promised to return in 3 days time to clear the debt. Two days later, two of the boys returned to request for more bread and cigarettes. She told the court that the said telephone was confiscated by the police, three days later. Her testimony was that she would not be in a position to identify the relevant telephone or the boys who brought it to her. It is not in dispute that this telephone was received or taken from her by Police officer PW11 and handed in as exhibit 4.

[19] The body of the deceased, (count one), was identified by her sister Maggie Sonto Nkambule (PW9). The postmortem report by Dr Komma Reddy (PW4) was handed in as exhibit A. On examination of the body, on 21st July, 2011, the pathologist came to the conclusion that the deceased died as a result of a single stab wound or injury to the chest. This wound was 2 x 1 cm and was "on the middle and lower portion of the front and left side of the chest, which is 1.5cm from the midline and 16 centimetres from and

above the umbilicus." The doctor also noted contusions on the forehead, left cheek, upper lip, nose and chin. He said these were ante-mortem in nature and could have been caused by a blunt force.

[20] According to PW11, after the discovery and identification of the body of the deceased, the police obtained electronic and digital information or evidence from MTN, who was the Service Provider for cellular telephonic messages for the deceased, that airtime worth E2.00 had been on 16th July 2011, transferred from the deceased's mobile telephone into PW12's mobile telephone. This information was also confirmed by PW12 who informed the court that this airtime had been sent or transferred to his mobile telephone by A1 on the evening or night of 16th July 2011. He received this airtime from an unknown number but later A1 called him to say he had sent it.

[21] It has not been denied by A1 that when PW12 told him that the police were questioning him about the airtime he had received from him (A1), A1 instructed PW12 to delete such information from his cellular telephone, so that the police could not find it.

[22] Following the information given to the police by PW12 regarding the use of the deceased's mobile telephone, the police arrested A1. This was followed by the arrest of the other accused persons.

[23] According to PW11 all accused persons were warned in terms of the judges rules upon their arrest. In particular, the accused were cautioned and warned that they were not obliged to say or point out anything to the police; but if they did so such evidence would be taken down in writing and used in evidence against them in their trial. This was after the accused had been told by the police that they were suspects in the two cases under consideration herein.

[24] Following the above caution, A1 and A2 led the police to PW8 from whom exhibit 4 – the Nokia 1200 mobile telephone belonging to the deceased was found or obtained. Thereafter both accused led the police to PW3 from whom an okapi knife (exhibit 6) was obtained. The other mobile telephone, exhibit 3 was recovered as a result of information given by A3. This gadget belongs to PW5, the complainant in count two. It was identified by its serial number 359310020190161, which had been supplied or given to the police by PW5.

[25] It is common cause that the reddish sweater, exhibit 2 was obtained by the police from an unidentified Mamba boy following information given to them by A3. This sweater, it has been established belongs to Siboniso Tsabedze, the complainant on count two. It was forcefully taken from him during the robbery in question.

[26] I have detailed the evidence by the crown witnesses above and also indicated or showed how each item belonging to the deceased and the complainant is linked to or connected with each of the accused herein. It was based on the above analysis that I refused an application for the discharge of the accused at the close of the crown case. Each of the accused is implicated in the respective counts herein.

[27] During cross examination nothing was put or suggested by the defence to the crown witnesses on how each accused came to be in possession of or have knowledge of the incriminating material or information in this case. I shall return to this issue later in the judgment when I deal with the merits or demerits and or the probabilities involved in this case.

[28] In cross-examining the crown witnesses, in particular PW3 (Ncamiso Soko), the defence put it to him that the accused never told him that they had committed robbery on the night or evening in question.

[29] In his defence, A1 told the court that indeed he had been in the City on the day in question with his co-accused and PW3. He also confirmed that the quartet had gone to Town at his request as he wanted to purchase certain household goods there.

[30] A1 told the court that on their way back to Eticantfwini the four of them, ie the 3 Accused and PW3, went into the Grand Valley bar to watch a soccer match on television. He testified that at the end of the match, he asked A2 to accompany him to the nearby Petrol Filling Station to purchase electricity units. They left A3 and Soko in the bar. On their return they did not find them there. They then decided to sit outside the bar and wait for them there. There were three men also seated outside the bar. Apparently a mobile telephone placed not far from where they sat rang and A2 picked it up. One of the three men sitting nearby claimed it was his but after a brief discussion between them, A2 retained possession of the mobile telephone. The three men then left, leaving A1 and A2 at the scene. Just then A1 noticed a black plastic bag lying nearby. He picked it up and therein found the black adidas shoes, exhibit 1. He said despite advise from A2 to leave the shoes there, A1 said he took them with him and the two went to his house. A2 had the mobile telephone.

[31] Once at home he paged through the mobile telephone in an attempt to find out who the owner was. He was unable to get this information. It was during this search that he sent the E2.00 airtime found therein to PW3 and later confirmed having sent it to him. They were later joined by A3 and PW3 at his house.

[32] The telephone referred to by A1 is clearly exhibit 4 belonging to the deceased. I say so because A1 confirmed that he together with his co-accused had led the police after their arrest to Dumsile Dludlu (PW8) from whom it was recovered and confiscated by the police. Again, A1 confirmed having been in possession of exhibit 1 and that he had handed these shoes to the police upon his arrest. He testified that he had explained to the police how he had come to be in possession of these items; namely that the items were found by them outside the Grand Valley bar on 16th July, 2011. He said the police did not believe them but accused them of having committed the two crimes herein.

[33] A1 further confirmed having instructed PW3 (Soko) to delete from his telephone, the information that he had received airtime from exhibit 4. He explained that he did so because he thought the three men they had had an altercation with outside the Grand Valley bar might have reported the issue to the police.

[34] A2 threw his lot with A1 regarding the events in question. He told the court that when they returned to A1's house that evening, he was too drunk and did not speak to either PW3 or A3. He said PW12 (Sparks) was also there. He did not deny having been given exhibit 5 (the knife) by PW3.

[35] In his defence, A3 testified that he left his co-accused and PW3 at the Grand Valley bar to go to the toilet and when he returned, he found that they had left the bar. He went outside to look for them but could not find them anywhere. He started on his journey home and near the traffic lights, he found PW3 and they walked together to the home of PW12, hoping to find A1 and A2 there. A1 and A2 were, however not there. Together with PW12, they went to A1's house where they found A1 and A2.

[36] It was A3's testimony that he purchased exhibit 3 (the sweater) and Nokia mobile telephone from one Ngangenyoni Simelane on 19th July, 2011 at Eticantfwini. He said Ngangenyoni said he was selling these things because he needed money to attend to a funeral at his home in Ngwavuma. He paid E50.00 for the sweater and E200.00 for the telephone. A3 also confirmed having given the sweater (exhibit 2) to Pw7 – He said he had lent it to him. That in a summary form is the evidence by the defence.

[37] Save for exhibit 5 (the okapi knife), all the exhibits were discovered by the police as a result of information given to them by the accused. In each instant, the accused gave an explanation to the police how they either had knowledge of these items or how these items had come to their possession. For instance, A1 and A2 said they found exhibit 4 and exhibit 1 outside the Grand Valley bar. A3 said he had innocently bought exhibit 2 and [3] from Ngangenyoni Simelane. All these are exculpatory explanations. They are not confessions in any way whatsoever and as such do not have to be shown to have been freely and voluntarily made by the accused. Recently in *Rex v Ndumiso Muzi Maziya, case no 137/2008*, judgment delivered on 14th March 2013 (unreported), I had occasion to say:

> 'The pointing out by the accused of the screw-driver to the police should be viewed in its proper context. That context is the accused telling the police that he had committed no offence at all as he had accidentally stabbed the deceased. In a word, the accused said 'I am innocent. I accidentally stabbed the deceased and here is the screw-driver I used.' This is an exculpatory statement. It does not have to conform or satisfy the strictures relating to admissions or confessions by an accused as laid down in JULY MHLONGO and OTHERS v R, (Appeal case No. 185/92) and ALFRED SHEKWA AND ANOTHER v REX (Appeal Case No. 21/94) both yet unreported. In both these cases our Court of Appeal approved and followed the South African Appellate Division judgment in *S v Sheehama*, 1991 (2) SA 860 (A) that:
>
> 'A pointing out is essentially a communication by conduct and, as such, is a statement by the person pointing out. If it is a relevant pointing out unaccompanied by any exculpatory explanation by the accused, it amounts to a statement by the accused that he has knowledge of relevant facts which prima facie operates to his disadvantage and it can thus in an appropriate case constitute an extra-judicial admission. As such, the common law, as confirmed by the

> provisions of section 219A of the Criminal Procedure Act 51 of 1977, requires that it be made freely and voluntarily.'
>
> The underlining is mine and the relevant section of our Criminal Procedure and Evidence Act 67 of 1938 is 226(1).'

I reiterate these remarks in this case. Consequently, the evidence on how these exhibits were found by the police is, in my judgment, admissible or receivable in this trial.

[38] PW3 was a confidant of the accused persons. He went to town with them on 16th July and spent a few hours drinking liquor with them in town. He separated from them near the Grand Valley bar in the evening when they were preparing to go home. PW3 first re-united with A3 with whom they proceeded to go and watch a movie at the home of PW12, Mlandvo Nkambule also known as Sparks. After the movie, the pair went to the home of A1 where A1 and A2 were found.

[39] Whilst the group was gathered at the home of A1, A1 and A2 informed this witness that after their separation near the said bar; the accused had committed two robberies before getting home. They also showed him the spoils or property they had taken from their victims. These properties, save for exhibit 5, are the exhibits in this trial ie, exhibits 1-4 herein. Indeed PW3 had not seen these items before in the possession of any of the accused. A3 specifically mentioned to PW3 that one of the persons they

had mugged that evening was the one whom they had seen near the bar. It must be remembered of course that PW3 told the court that this person had gone past them and walked in the direction of the Petrol filling station. This is the same direction traveled or taken by the accused when they separated from PW3. They went to the filling station to buy food, he said.

[40] From the first victim, the accused told PW3 that they had taken a Nokia mobile telephone, a hooded sweater and the black adidas shoes. These items, PW3 said, were shown to him by the accused.

[41] All three accused persons further informed PW3 that their second victim had fought back or resisted being robbed of his property and had been "accidentally" stabbed by A2 in the process. However, it was made clear to PW3 that only A1 and A2 were involved in this robbery (where the victim was stabbed by A2). A cellular telephone had been forcefully taken from him.

[42] The accused denied having made the above confession or disclosures to PW3. PW3 was, however, adamant that they did. He was also steadfast in his evidence that although he could not positively say the items shown to him by the accused were the exact items or cloths worn by the person he had seen near Grand Valley bar, they looked or appeared exactly like those.

These items, exhibits 1 and 2 were later, together with the Nokia 7210 mobile telephone, positively identified by PW5 as the items that were forcefully taken from him on the evening in question.

[43] From the information gathered by the police from MTN and the relatives of the deceased, the crown was able to prove beyond my reasonable doubt that exhibit 4 belonged to the deceased. The accused of course did not dispute or challenge this evidence. (A1 and A2 said they found this telephone abandoned outside the Grand Valley bar).

(44) I have already mentioned above that the accused's versions of how they got to be in possession of the incriminating items – was never ever put to the defence witnesses. Only a bare denial was made by each of them – through defence counsel. There was no indication by A1 and A2 that they had found the relevant exhibits outside the Grand Valley bar. Again, there was no indication or intimation by A3 that he had innocently purchased exhibits 2 and 3 from Ngangenyoni Simelane. This should have been done at the appropriate time for the crown witnesses to deal with it. But, I must hasten to emphasise that this failure or lapse by an accused person or his counsel can never be a substitute for the required proof that rests on the crown throughout the trial.

[45] In *R v Mngomezulu Dominic and 3 others Crim. 94/90* (unreported), Hannah CJ stated as follows:

> '…before turning to consider that evidence it is necessary to say something on the subject of counsel's duty to put the defence case to prosecution witnesses. In S v P 1974 (1) SA 581 (Rhodesia, A.D.) MacDonald JP said at page 582:
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> > "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 … 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 either put the defence case, or seek guidance from the court."
>
> Counsel for the defence is, therefore, under a duty to put the defence cse to prosecution witnesses but what if he does not? The position is set out in Phipson on Evidence 10th ed at para. 1542 as follows:-
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> > "As a rule a party should put to each of his opponent's witnesses in turn so much of his own case as concerns that particular witness, or in which he had a share, e.g. if the witness has deposed to a conversation, the opposing counsel should indicate how much he accepts of such version, or suggest to the witness a different one. If he asks no questions he will in England, though not perhaps in Ireland, generally be taken to accept the witness's account.
> >
> > Moreover, where it is intended to suggest that the witness is not speaking the truth upon a particular point his attention must first be directed to the fact by cross-examination, so that he may have an opportunity of explanation …….. Failure to cross-examine, however, will not always amount to an acceptance of the witness's testimony, e.g. if the witness has had notice to the contrary beforehand, or the story is itself of an incredible or romancing character, or the abstention arises from mere motives of delicacy ….or when counsel indicates that he is merely abstaining for convenience e.g. to save time. And where several witnesses are called to the same point it is not always necessary to cross-examine them at all."

> This passage was cited with approval by Davis AJA in R v M 1946 AD 1023 at p. 1028 but the learned judge added:-
>
> > "These remarks are not intended to lay down any inflexible rules even in civil cases, and in a criminal case still greater latitude should usually be allowed."
>
> 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 accuse 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.'

[46] The disclosures that were made by the accused to PW3 were made almost immediately after the offences were committed. The accused did not just say they had committed two robberies but showed PW3 the properties they had obtained from their unlawful enterprise.

[47] PW3 gave his evidence in a clear, consistent, coherent and straight forward manner. He was not seriously challenged under cross examination. As a witness, he was credible, honest and reliable. I have no hesitation in accepting his evidence as truthful.

[48] Each of the accused has given his version on how each is not connected with or guilty of the offences herein. Each version is clearly an afterthought. It is false. It cannot, in face of the evidence already stated above, be reasonably possibly true. It is hereby rejected.

[49] From the foregoing analysis of the evidence by the crown, it is plain to me that the person that was stabbed by A2 on the relevant evening was the deceased. This is confirmed by his mobile telephone that was subsequently traced to A1 and A2 and finally obtained from Dumsile Dludlu (PW8). The evidence clearly shows that the deceased was the second robbery victim by the accused that evening. When their first victim was attacked a knife was also used. Again when PW3 handed the knife to A3 the other accused persons witnessed this. Therefore, when each of the robbery victim was attacked by the accused, all the accused present and participating in the respective attacks was aware that A2 was armed with that knife. They each realized that since they were involved in a potentially violent confrontation with their victims, A2 was most likely to make use of the knife in either warding off an attack or in order to compel their victim to submit to their unlawful demands.

[50] I have already concluded that the crown has proven that the crime of robbery was committed on count two. Again, because of the evidence of PW3 and also the incriminating evidence of the possession of the property of the complainant on that count by the accused persons, I hold that the crown has established, beyond any reasonable doubt that it is the three (3) accused persons herein who committed this crime.

[51] When Mr Tsabedze was robbed, the man wielding the knife held him by his cloths and demanded money from him. The other two Accused persons searched his pockets as he was being held at knife point by the other man. This proves, beyond any doubt in my judgment, that the accused were acting in the furtherance of a shared purpose. That purpose was to rob the victims of their property and physically harm or kill them if they resisted. Because of this conclusion, that a common purpose has been proven, it is not necessary for me in respect of the first count to establish, who between A1 and A2 actually delivered or inflicted the fatal blow on the deceased.

[52] In *R v Sicelo Chicco Dludlu and 2 others*, *case 10/2008*, judgment delivered on 20th September, 2012 the court had this to say on the doctrine of common purpose;

'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.'

[53] When A1 and A2 assaulted and stabbed the deceased in the manner as evidenced by the postmortem examination report (exhibit A), though perhaps not positively intending to kill him, must have realized and did therefore realize that their actions might cause his death. They, however, acted with wanton disregard and recklessness, not caring whether he died or not. At the end he died. They are guilty of the crime of murder on the bases of indirect intention. (Vide again *Sicelo Chicco Dludlu (supra)* at paragraph 18).

[54] From the foregoing, I hold that:

(a) A1 and A2 are guilty as charged of the murder of Simanga Nkambule (count one).

(b) All three (3) accused persons are found guilty of the crime of robbery in respect of count two.

MAMBA J

For the Crown : Ms Q. Zwane

For the Defence : Mr B. Dlamini