



IN THE HIGH COURT OF SWAZILAND

Civil case No: 376/2011

In the matter between:

REX

VS

CLEMENT VIKIMPI MBHAMALI

MDUDUZI DLAMINI

THEMBINKOSI SIBIYA

Neutral citation: *Rex v. Clement Vikimpi Mbhamali & 2 Others (376/2011)*
[2014] SZHC127 (19 June 2014)

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

Summary

Criminal Law – Murder – all three accused charged with murder on the basis of the doctrine of common purpose – the doctrine of common purpose considered – held that the accused were guilty of the offence on the basis of a prior agreement to commit the offence – held further that no extenuating circumstances existed in the matter.

JUDGMENT
19 JUNE 2014

[1] The three accused were charged with murder and it being alleged by the Crown that on the 11th August 2009 at Mphandzeni area in the Shiselweni region the accused acting in furtherance of a common purpose unlawfully and intentionally killed Aaron Zeze Simelane. They pleaded not guilty to the offence.

[2] The post-mortem report was admitted in evidence by consent in terms of section 292 of the Criminal Procedure and Evidence Act 67/1938, and, it was marked Exhibit 1. The cause of death was due to multiple penetrating injuries. There were blood stains over the scalp, face, trunk as well as the upper limbs. The following antemortem injuries were observed: Firstly, a cut wound over the neck outer aspect towards midline on the right side 5.7 cm vertebra deep with breadth 2.3 cm. It involves muscles, nerves, blood vessels, vertebra 2 cervical right to left. Secondly, cut wounds behind right ear and below 1.5 x 0.7 cm, 2 x 0.7 cm muscle deep. Thirdly, cut wound over right arm 3.5 x 1.4 cm muscle deep. Fourthly, penetrating wound over right chin 2.5 x 1 cm 2 x 1 cm muscle deep. Sixthly, penetrating wounds over back of chest middle left and right measuring 1.5 x 0.7cm, 2.5 x 1 cm, 2 x 0.7 cm, 1 x 0.7cm, 1.8 x 0.7 cm, and 2 x 0.7 cm, 1.8 x 0.7 cm lungs deep. Involved muscles, intercostals structures, pleura, lungs 0.9 x 0.6 cm. Area involvement is 13.7 cm area back to front. Pleural cavity contained about 1700 ml blood edges clean cut, angle sharp.

[3] PW1, Hugh Funa Mavuso is a teacher employed by the Swaziland Government and based at Siyendle Community School. He testified that he knows the first accused since 2009. On the 11 August 2009, he was hired by the first accused to drive him to Ntuthwakazi area to fetch his traditional medicine as he was a traditional healer. He didn't know the area; however, the first accused was directing him until they arrived at their destination.

On arrival the first accused told him to park the motor vehicle about fifty metres away from the homestead; he went to the homestead leaving PW1 in the motor vehicle. The first accused returned after three hours, and, they went back home. Along the way the first accused disclosed that he had not finished his business and would ask that he transports him again on another day.

[4] A week later the first accused asked PW1 to transport him back to the same homestead at Ntuthwakazi. Again he went into the homestead and left PW1 in the car; and, he came back after an hour in the company of two men. They boarded the motor vehicle and drove off to the first accused's homestead; the time was 12:30 pm.

Along the way the first accused asked the two men to assist him kill the deceased on the ground that the motor vehicle which he had sold to the deceased had no proper registration documents; and, that the deceased was demanding the documents. He promised to pay the two men with his kombi as

he did not have money. At that juncture PW1 intervened and pleaded with the first accused to resolve the problem amicably instead of killing the deceased. In response the first accused told him that if he doesn't kill the deceased, there was a likelihood that the deceased would kill him; in addition, he advised PW1 not to involve himself in the matter otherwise he would face repercussions of being killed as well.

PW1 left the first accused and the other two men at the first accused's homestead, and, he was told that he would transport the two men later that day. After sometime the first accused phoned PW1 to come back. PW1 found the first accused at his home, and, he told him that they would find the two men along the Mabhudlweni river where they were looking for a particular traditional medicine.

- [5] The two men boarded the motor vehicle, and, they drove them with the first accused to their homestead across the Ngwavuma river at a Sibiya homestead. Along the way the two men told the first accused that they had accomplished their mission and killed the deceased with knives. Thereafter, he drove the first accused to his homestead at Mahlambi area. PW1 subsequently learnt that the deceased had died on the 11th August 2009, which was the same day that he transported the first accused and the two men. He was able to describe all three accused during his evidence in-chief.

[6] Under cross-examination PW1 told the court that he had known the first accused for five years, and, that he was a traditional healer and also involved in the transport business. He reiterated his evidence that he transported the three accused in his motor vehicle on the 11 August 2009 to and from Ntuthwakazi. He denied that he had only transported the first accused to Big Bend to the homestead of a traditional healer. He further reiterated his evidence that the first accused had told the second and third accused that he had sold a motor vehicle to the deceased which had registration problems; and, that he wanted to kill the deceased before he could kill him. Similarly, he reiterated his evidence that whilst transporting the three accused, he overheard the first accused asking the other two accused to kill the deceased. He told the court that he couldn't report the plot to the police because the first accused had threatened to have him killed if he involved himself in the matter. PW1 further told the court that he never met or communicated with the three accused after the incident.

[7] When the defence put to him that the second and third accused reside at Ndunayithini area and not Ntuthwakazi, PW1 insisted that he knew the homestead where they had fetched the second and third accused even though he may not be sure of the name of the place. It was apparent from his evidence that PW1 didn't seem to recall the time when they fetched the second and third accused from their homestead or when they arrived at the first accused's home or when they drove the accused back home; however, such a discrepancy is minor and cannot discredit the evidence of PW1 in the circumstances.

[8] PW2 Sibongile Dlamini (nee Simelane) resides at her marital home at Mphandzeni area. She testified that on the 11th August 2009, she set off from her homestead to cut thatching grass in the vicinity. She saw the deceased driving cattle to the grazing area. Meanwhile she went to a neighbour's homestead where they had some discussions. After sometime she proceeded with her journey to cut the grass. She saw two men attacking the deceased; the deceased was retreating moving backwards.

[9] Thereafter, she witnessed the two men stabbing the deceased with knives several times, and, the deceased was trying to run away. PW2 was shocked and scared, and, she ran away. She could not raise an alarm because the homesteads were far away and the people could not hear her. Furthermore, she was scared that if she raised an alarm, the two assailants would attack her particularly because she had witnessed the attack. The deceased fell on the ground. The assailants then left the scene and walked towards Mabhudlweni.

[10] Realising that the assailants were far away PW2 cried aloud as she could not cry earlier for fear of the assailants. She walked towards the homestead of the deceased. When she reached a shopping complex, she met other people including the deceased's child Nduna Simelane. She led them to the scene of crime where they found the deceased's dogs standing guard over him. The deceased was dead with multiple stab wounds; and, his throat was cut-off. The

police were called and he was taken to the mortuary. Under cross-examination she conceded that she could not identify the two assailants. In addition she was not able to say what was the time of the attack.

[11] PW3 Abella S. Mtshali resides at Timphandzeni area under Chief Magoloza Mkhonta. This is the same area where the first accused resides. He testified that he is the Chief's headman in the area; and, that one of his duties is to preside over disputes between the residents of the area. He knew both the deceased and the first accused.

PW3 further testified that on the 28th July 2009, the deceased reported to him a dispute that he had with the first accused. The dispute was that the first accused took his six cattle in exchange for a motor vehicle; however, the first accused did not give registration documents of the motor vehicle to the deceased, and, the deceased was demanding the return of his cattle and tendering the return of the motor vehicle to the first accused.

[12] The matter was heard at the Umphakatsi on the 4th August 2009 where the deceased gave his evidence. The matter was postponed to 11 August 2009 when the first accused was to bring his witnesses before the Chief's Inner Council. However, on that particular day, PW3 received a report that the deceased had been killed by two people on that very day. He went to the scene and saw the deceased's bloodstains; his body had been transported by the

police to the mortuary. Due to the failure by the first accused to attend the Chief's Kraal, community police were dispatched to look for him but could not find him.

PW3 maintained his evidence during cross-examination. He further denied knowledge that the first accused had reported to the Chief's Kraal that the deceased and his friends had attacked him between the 4th and 11th August 2009 carrying dangerous weapons. Similarly, he denied knowledge that a dispute had been reported to him by the first accused that the deceased was refusing to return six cattle which he had sised to him.

- [13] PW4 Detective Sergeant Nhlanhla Mkhabela based under the Scenes of Crime Department testified that on the 11th August 2009, he received a report of an alleged murder at Mphandzeni area. He proceeded to the scene of crime where he noted struggle marks and bloodstains leading to the deceased's body. There was a pool of blood nearby and the deceased was identified as that of Aaron Zeze Simelane. He took photographs of the scene. Thereafter, he removed clothing from the deceased and noticed two stab wounds on the right cheek, four stab wounds at the back of the right ear, an open cut on the right neck, a stab wound on the right shoulder, a stab wound on the right front of the neck, a stab wound on the right chest, eight stab wounds at the back upper body. Nine photographs of the scene showing the crime scene as well as the injuries sustained by the deceased and marked Exhibits 2 to 10. Thereafter, the

deceased's body was taken to mortuary. Under cross-examination PW4 stated that he received the report about the alleged murder at about 10.30 am.

[14] PW5 Detective Constable Dumisani Zwane is the investigator of this case. He testified that on the 29th January 2011 he received information from Hluti Police Station that the second accused was at the police station. He proceeded to Hluti Police Station with other police officer. On arrival they introduced themselves to the second accused, and, they explained to him that they were investigating the death of Aaron Zeze Simelane who died in 2009. His rights to remain silent were explained; however, he decided to say something which led to his arrest. He was driven to Nhlangano Police Station where he was detained pending further investigations.

On the 31st January 2011 after being cautioned, he led the police to Mbhedlweni area where he had earlier undertaken to give them a knife used in the killing of the deceased. However, the place was bushy and nothing could be found. Back at the police station, he was formally charged with murder.

[15] PW5 continued with his investigations together with other police officers, and, this culminated in the arrest of the third accused at a Magagula homestead at Mpini area in the Hluti sub-district. They introduced themselves and further explained his right to remain silent as well as legal representation. The third accused opted to say something which led to his arrest. On the next day he led

them to his homestead at Ndunayithini area. In his mother's house he retrieved a man-made knife as the weapon used in the commission of the offence; and, he was later charged with murder. At the homestead of the third accused, the police were accompanied by Mr. Nhleko whom they found in the vicinity; he was herding cattle. Mr. Nhleko was present when the third accused handed a knife and a T-shirt to the police.

[16] On the 4th August 2011 PW5 received a telephone call from the police stationed at the Mahamba Border Post relating to the first accused. Together with other police officers, PW5 proceeded to the border post where they found the first accused in the company of police officers on the Swaziland side of the border. The first accused had been deported by the South African Police based at Piet Retief and handed over to the local police at Mahamba Border Post. The deportation documents were admitted in evidence during the trial and marked exhibits 11 and 12.

The first accused was cautioned and further advised of his right to remain silent and to legal representation. He opted to say something, and, this led to his being arrested. He was formally charged with murder when they arrived at Nhlanguano Police Station.

[17] Under cross-examination PW5 maintained his evidence. He was honest, forthright and unequivocal. The defence tried without success to challenge his

evidence. The evidence that PW3 voluntarily retrieved a knife used in the commission of the offence from his mother's house could not be controverted. Similarly, the evidence that the third accused handed to the police the T-shirt he wore during the commission of the offence from his mother's house remained uncontroverted.

The evidence by PW5 that the second accused led the police to the scene in the presence of a community police Mr. Shiba to retrieve the knife used in the commission of the offence was not controverted. It was the evidence of PW5 that the knife couldn't be found because the site of the scene was bushy with thick grass.

More seriously the defence did not challenge the evidence of PW5 that the first accused had fled the country after the killing of the deceased to South Africa, and, that he was arrested by the South African police and deported back to Swaziland.

[18] It is against this background that the accused were called to their defence and their application for acquittal under section 174 (4) of the Criminal Procedure and Evidence Act was dismissed. The court also took into account the evidence of PW1 Hugh Funa Mavuso, PW2 Sibongile Dlamini, PW3 Abella Mtshali as well as the evidence of Sgt. Nhlanhla Mkhabela. In addition there was evidence of the post-mortem examination which was admitted by consent

and marked Exhibit 1; this evidence showed that the deceased died of multiple stab wounds, and, this corroborated the other evidence of the Crown. The Crown closed its case after the evidence of PW5.

[19] The first accused testified that he knew PW1, and, that he assisted him with transport; however, he denied that he transported him to Ntuthwakazi area with the second and third accused. He did not specifically deal with the evidence of PW1 that he had asked the second and third accused to kill the deceased over a dispute they had over a motor vehicle which he had given to him in exchange for six cattle. Furthermore, he did not dispute the evidence of PW1 that he had undertaken to pay the second and third accused by giving them a kombi. Similarly, he did not dispute the evidence of PW1 that when he intervened in the discussion and suggested that the first accused should settle the dispute with the deceased amicably, the first accused had told him that he had to kill the deceased first before he could kill him.

[20] In addition the first accused did not dispute the evidence of PW1 that together with the first accused, he had transported the second and third accused to Mabhudlweni at Timphandzeni area with the instruction from the first accused to collect them later; and, that the first accused told him that the second and third accused were there to look for traditional medicine along the Mabhudlweni river. It was the evidence of PW1 that the first accused later instructed him to collect the second and third accused from where they had left

them. Together with the first accused they collected them at Mabhudlweni. Upon boarding the motor vehicle, they told the first accused that their mission was accomplished; and, that they had killed the deceased using knives.

[21] In his evidence in-chief the first accused corroborated the evidence of PW3 that he was summoned to the Chief's Kraal to answer to a complaint lodged by the deceased that the first accused had given him a motor vehicle in exchange for six cattle; and, that he couldn't use the motor vehicle on the basis that it had no registration documents. The first accused further corroborated the evidence of PW3 that the dispute had been deliberated and postponed to the 11th August 2009 where the first accused was expected to bring his witnesses. The first accused contended that he was present at the Chief's Kraal on that day for continued deliberation. However, this evidence is in contrast to that of PW3 who testified that the first accused did not attend the Chief's Kraal as expected and that he had to send out community police to look for him but they could not find him. During the cross-examination of PW3 the defence did not dispute this evidence by PW3, that the first accused failed to attend the Chief's Kraal in the dispute with the deceased or that he could not be found by the community police.

[22] The first accused conceded that he was arrested by the South African Police at Piet Retief and consequently deported back to Swaziland. However, he argued that he had left the country two weeks before the death of the deceased to

consult Dr. Myeni in Piet Retief; and, that he couldn't return home timeously on the basis that he was subsequently involved in a motor vehicle accident. He doesn't explain why he could not use a passport when entering South Africa through a border gate if he was not in flight. Furthermore, he doesn't produce medical evidence that he was consulting Dr. Myeni in South Africa. Similarly, he doesn't furnish evidence proving that he was involved in a motor vehicle accident in South Africa.

[23] The evidence given by the first accused that he had left the country for South Africa two weeks before the death of the deceased contradicts his own evidence and that of PW3 that he was at the Chief's Kraal on the 4th August 2009 attending to the dispute with the deceased. That evidence further contradicts his own evidence that he attended the Chief's Kraal on the 11th August 2009 for the continued hearing of the dispute with the deceased.

In addition this evidence contradicts his own evidence that immediately after the death of the deceased, he received a telephone call from his homestead that the police were looking for him; and, that at the time, he was at Nhlangano Taxi Rank where he conducted his kombi business. He told the Court that the police had arrived at the Taxi Rank and found that he had transported his customers to places bordering Nhlangano. On his return he went to the Nhlangano Police Station where he was questioned about the death of the

deceased; and, that he had denied any wrongdoing and the police released him to go home.

[24] The first accused produced a transportation permit as evidence that he was in the country immediately after the death of the deceased; however, the permit was not admitted in evidence because it did not prove the first accused's contention. Ironically, what he intended to prove was contrary to his earlier evidence that he went for medical treatment in South Africa two weeks before the deceased died, and that he only returned to the country after he was deported by the South African Police.

[25] During cross-examination the first accused further contradicted himself by saying that they had resolved the dispute with the deceased amicably; and, that what remained for them was to report the settlement to the Chief's Kraal. Again this evidence contradicts his earlier evidence that he had to bring his witnesses on the 11th August 2009 for the continuation of the hearing. He was evasive during the entire cross-examination. In addition he failed to explain why PW1 could fabricate a story against him that he had transported the second and third accused and further plotted to kill the deceased when they were friends.

[26] In an attempt to prove that PW1 only transported him to Big Bend and not to Ntuthwakazi, the first accused brought Elmon Mabundza as his witness;

however, his evidence was contradictory and did not advance the first accused's case. This witness testified that the first accused arrived at his homestead in Big Bend in a motor vehicle which left him behind; and, that he stayed with him for three weeks in March 2009. According to this defence witness, the first accused wanted Mr. Mabundza to take him to a traditional healer, Absalom Masimula, for treatment. However, under cross-examination Mr. Mabundza contradicted himself and said that the first accused was visiting his sister, and, that since the sister's house was small, she had asked him to accommodate the first accused. Nothing was said about the traditional healer Absalom Masimula under cross-examination. The first accused's sister Dumsile Mbhamali was never called to corroborate the first accused's evidence; and, the traditional healer Absalom Masimula was said to have died in 2013.

[27] The second and third accused in their evidence in-chief denied knowledge of the first accused; according to their evidence, they saw him for the first time at Nhlanguano Remand Centre. This was also the evidence of the first accused with regard to the second and third accused. Similarly, they denied that they knew PW1 or that PW1 transported them with the first accused in his motor vehicle. They also denied plotting to kill the deceased with the first accused; and, they further denied killing the deceased. The second accused denied leading the police to the scene but alleged that it was the police who took him

to a place he didn't know and told him to retrieve the knife used in the commission of the offence.

[28] However, the defence failed to dispute the evidence of PW1 that they were collected by PW1 and the first accused from their homestead to Timphandzeni area. They further failed to dispute PW1's evidence that along the way they plotted to kill the deceased at the instance of the first accused or that the first accused had told PW1 that the first and second accused had gone to Mabhudlweni to collect traditional medicine. The evidence of PW1 that on their return from Mabhudlweni, the second and third accused told the first accused that their mission had been accomplished, and that they had used knives to kill the deceased was not challenged. Furthermore, they could not suggest the reason why PW1 could fabricate a story against them. Under cross-examination PW1 had positively identified all the three accused persons.

[29] PW2 testified that two men accosted the deceased and stabbed him several times along Mabhudlweni river on the 11th August 2009. This evidence corroborates the evidence of PW1 that the second and third accused alighted at Mabhudlweni and were collected later that day. This evidence was not challenged. The plot to kill the deceased is further apparent in the evidence of PW3 that the first accused had a bitter dispute with the deceased at the time of his death which was being determined by the Chief's Kraal. The deceased was killed on the very same day that the matter was to resume at the Chief's Kraal.

[30] The evidence of PW4 corroborates that of PW2 as well as the post-mortem report that the deceased sustained multiple stab injuries. The evidence of PW1 is further corroborated by the evidence of PW5 that the second accused led the police to the scene of crime where he wanted to retrieve the knife used in the commission of the offence but found the place too bushy to find the knife. Furthermore, the evidence of PW1 is further corroborated by the evidence of PW5 that the third accused led them to his parental homestead where he handed to them a home-made knife which he allegedly used in committing the offence. The third accused further handed to the police a T-shirt which he was wearing during the commission of the offence. Both the knife and T-shirt were admitted in evidence during the trial.

[31] The flight of the first accused to South Africa immediately after the death of the deceased provides further evidence that the first accused hired the second and third accused to kill the deceased. His consequent deportation as well as the many contradictions in his evidence point to the guilt of the first accused. The plot to kill the deceased satisfies the requirements of the doctrine of common purpose. *Moseneke J in S. v. Thebus* 2003 (6) SA 505 CC at para 18 and 19 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) defines 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 their ‘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.”

[32] Moseneke J clarified the causal nexus between the conduct of an accused and the criminal consequences where the doctrine of common purpose is invoked.

At para 34 he had this to say:

“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 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 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 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.”

See also the cases of *S. v. Mgedezi and Others* 1989 (1) SA 687 (AD) a pp 705-706, *S. v. Safatsa* 1988 (1) SA 868 AD; *Phillip Wagawaga Ngcamphalala and Seven Others v. Rex* Criminal Appeal No. 17/2002.

[33] The defence in this matter has argued that there is no direct evidence of the commission of the offence, and, that the Crown’s evidence is merely circumstantial. To that extent it was argued that none of the Crown’s witnesses observed the killing of the deceased. However, all the inferences sought to be drawn are consistent with all the proved facts as apparent from the analysis of the evidence in the preceding paragraphs.

In the Supreme Court of Appeal of Swaziland in the case of *Sean Blignaut v. Rex* Criminal Appeal case No. 1/2003 at pp. 14 and 15 *Beck JA* delivering a unanimous judgment had this to say which is equally applicable in this case:

“It is trite that the cumulative effect of a number of incriminating probabilities may suffice to eliminate any reasonable possibility of innocence, even though each and every individual probability is on its own not strong enough to do so. But when reasoning by inferences drawn from circumstantial evidence the touchstone remains the two cardinal rules of logic enunciated in the leading case of Rex vs Blom 1939 A.D. 199. Those two rules are that the inference sought to be drawn must be consistent with all the proved facts; if it is inconsistent with any one proved fact it cannot be drawn. And the second rule is that it must be the only inference that can be drawn from the proved facts; if another one or more reasonably possible inferences can be drawn from those facts one cannot know which is the correct inference to be drawn.”

[34] Having come to this conclusion that the three accused persons are guilty of murder based on the doctrine of common purpose, I must emphasize that the Crown has established that each accused had the necessary *mens rea* to commit the offence. I have examined the Crown’s evidence in respect of each accused and I am satisfied that the offence was premeditated on the basis of the prior agreement between the accused. It is well-settled that murder is the unlawful killing of a human being with intent to kill. In this matter the Crown has proved the existence of *mens rea* in the form of *dolus directus* as opposed to *mens rea* in the form of *dolus eventualis* where the accused realises the risk to life coupled with recklessness as to whether death results or not. In this instance there is *mens rea* in the form of *dolus eventualis*.

See the case of *Annah Lokudzinga Matsenjwa v. Rex* 1970-1976 SLR 25 CA at 27; *Mazibuko Vincent v. Rex* 1982-1986 SLR 377 (CA) at p. 380; *Thandi Tiki Sihlongonyane v. Rex* Criminal Appeal No. 40/1997 at p. 4.

A finding of *mens rea* in the form of *dolus directus* presupposes that the commission of the offence is premeditated; hence, the investigation into the existence or otherwise of extenuating circumstances does not arise. Such investigation only arises where there is *mens rea* in the form of *dolus eventualis*.

See the case of *S. v. McBride* (40/88) (1988) ZASCA 40 (30 March 1988) at para 44-46.

Section 295 of the Criminal Procedure and Evidence Act No. 67 of 1938 provides for such an investigation and it provides the following:

“295. (1) If a court convicts a person of murder it shall state whether in its opinion there are any extenuating circumstances and if it is of the opinion that there are such circumstances, it may specify them:

Provided that any failure to comply with the requirements of this section shall not affect the validity of the verdict or any sentence imposed as a result thereof.

(2) In deciding whether or not there are any extenuating circumstances the court shall take into consideration the standards of behaviour of an ordinary person of the class of the community to which the convicted person belongs.”

[35] Accordingly, I find all three accused guilty of murder without extenuating circumstances.

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

For First Accused
For Second and Third Accused
For the Crown

Attorney Sifiso Jele
Attorney Ian Du Pont
Crown Counsel Ayanda Matsenjwa