



**IN THE HIGH COURT OF SWAZILAND
JUDGMENT**

HELD AT MBABANE

Criminal Case No: 99/10

In the matter between:

REX

and

**SWAZI MDLULI
SONTO GOODNESS NKOSI
KHOWE MFANIMPELA MBUYISA**

**1ST ACCUSED
2ND ACCUSED
3RD ACCUSED**

Neutral Citation : Rex v Swazi Mdluli & 2 Others (99/10) [2015] SZHC 74 (7 JULY 2015)
Coram : MABUZA J
Heard : 10/4/13; 11/4/13; 5/01/14, 6/2/14; 14/4/14.
Delivered : 7 JULY 2015

**SUMMARY: CRIMINAL LAW: 2ND AND 3RD ACCUSED WERE CHARGED WITH MURDER – 1ST ACCUSED HAVING TURNED ACCOMPLICE WITNESS.
CRIMINAL PROCEDURE - THE CAUTIONARY RULE IN RESPECT OF ACCOMPLICE EVIDENCE AND THE DOCTRINE OF COMMON PURPOSE WAS DISCUSSED – ACCUSED FOUND GUILTY AS CHARGED.**

JUDGMENT

MABUZA –J

- [1] The Accused are charged with the murder of Nongoza Hezekiah Masuku it being alleged that upon or about the 24th January 2010 at or near Ngelane area in the Shiselweni region the said Accused persons individually or all of them acting in furtherance of a common purpose did unlawfully and intentionally kill one Nongoza Hezekiah Masuku and did thereby commit the crime of murder.

- [2] Initially the police charged all three Accused but after the 1st Accused (hereinafter referred to as Swazi Mdluli) turned accomplice witness the case proceeded against the 2nd and 3rd Accused only. When the charge was put to the Accused they pleaded not guilty and their counsel confirmed the pleas as being consistent with their instructions.

- [3] The deceased was found dead at Ngelane area, Shiselweni on the fields near his home. He was found by PW1 Buyisile Msibi on the morning of the 24th January 2010. The police were called and PW2, 2648 Sergeant Msandi Dlamini went to attend the scene of crime. He found that the deceased had multiple injuries on his head. The deceased was conveyed to hospital. PW3

Mcebo Hlophe testified that Accused 2 hired him and Swazi Mdluli to kill the deceased and that she would pay them E2,000.00 each for that service. She wanted the deceased killed because he was bewitching her. They all agreed on a date on which to kill the deceased but Accused 2 did not have the money with which to pay them.

[4] Thereafter PW3 left for his parental home at Siteki with his girlfriend Dumsile Msibi (PW5). They were gone for two weeks and when they returned they found that the deceased had been killed and buried. PW3 did not carry out the mandate. On a certain date PW3 visited Swazi Mdluli who informed him that he had killed the deceased but had still not received his money from Accused 2.

[5] It was put to PW3 by Mr. Manana that he was actually introduced to Accused 2 by Accused 3 as the person that he had found to kill the deceased after he had failed to cause the deceased to be struck by lightning. PW3 denied this and re-iterated that the matter of the deceased's death was discussed by Swazi Mdluli and Accused 2. It was further put to him that when the matter of payment was discussed Accused 2 said that she did not

have any money and that PW3 would be paid by Accused 3. He denied this saying that Accused 2 said that she would pay him.

[6] It was put to PW3 by Mr. Manana that Accused 2 was in South Africa during the time that PW3 says he met with her during the discussion of killing the deceased. PW3 responded that when he returned to Ngelane from his parental home at Siteki he found that Accused 2 was away in South Africa. He was further told that while Accused 2 was in South Africa Accused 3 telephoned her and told her that he had procured the services of Swazi Mdluli to kill the deceased and that Accused 2 responded that she no longer wanted the deceased killed as she no longer lived in Swaziland.

[7] It was further put to PW3 that he was protecting his friend Accused 3 by implicating Accused 2. He denied this. It was put to him that Accused 2 never asked Swazi Mdluli to kill the deceased but PW3 denied this and stated that Accused 2 spoke to him in the presence of Swazi Mdluli.

[8] The evidence of PW3 was corroborated by PW5, Dumsile Msibi his girlfriend. She says that when he went to his parental home at Siteki he took her along. She says that along the way he told her that he was supposed to

receive money from Accused 2 who had hired him to kill the deceased. The deceased was Accused 2's uncle. She says that he told her that he could not carry out Accused 2's request. She confirmed that she and PW3 stayed in Siteki for two weeks before returning to Ngelane.

[9] PW8 Swazi Mdluli was introduced as an accomplice witness and was duly cautioned as such. He corroborated the evidence of PW3. He testified that he attended a meeting during December 2009 during which the death of the deceased was planned. The meeting was attended by Accused 2, Accused 3 and PW3. Accused 2 requested PW3 and Accused 3 to kill the deceased and she would pay them E40,000.00 (Forty thousand Emalangeni). However the plan was abandoned because Accused 2 failed to provide the money that she had promised to pay them.

[10] During early January 2010 Accused 2 telephoned Accused 3, PW8 was present. She was now residing in South Africa and had hired PW8 to look after her house at Ngelane. During her telephone conversation she reminded Accused 3 of their previous plan to kill the deceased and informed him that she still wished to go ahead with their plan. She would pay PW8 the sum of E1,000.00; Accused 3 would pay PW8 another E1,000.00; and another

unnamed relative would pay a further E1,000.00 bringing the total to E3,000.00.

[11] PW8 says that sometime later, Accused 3 visited him at Accused 2's home and gave him a cell phone with instructions that he would phone him on it when it was time to carry out the killing at 3.00 a.m. Accused 3 indeed telephoned him at the arranged time and he went to meet him. Initially, they had difficulty as to how they would draw out the deceased from his house or how they were going to kill him. Accused 3 came up with a plan. He telephoned the deceased and told him that a child of PW8 was ill at Accused 2's home and needed to be treated by the deceased. Accused 3 mimicked a woman's voice over the phone.

[12] Accused 3 thereafter sent PW8 to go and fetch the deceased and pretend to take him to Accused 2's house. Earlier when Accused 3 had phoned PW8, the latter had armed himself with a bolt-nut stick before venturing out. He went to fetch the deceased as instructed by Accused 3. The deceased obliged, put on his coat and took a torch and muti and they set off to Accused 2's house. Meanwhile Accused 3 hid behind the house armed with a sharp iron rod.

[13] About 50 metres away from the deceased house, the latter indicated that he wished to urinate. While he was urinating PW8 struck him with the bolt-nut stick. He struck him on the right side of the back of his head. He struck him again on the right ear and the deceased fell.

[14] He says that after the deceased had fallen PW8 became frightened because the deceased had not died. He turned back to Accused 3 who had been following closely and informed him that the deceased had not died. Accused 3 then struck the deceased with the iron rod saying that he was going to finish him off. The iron rod was sharp on one side like an axe. After he had struck him he came to where PW8 was standing and told him that the deceased was finally dead and that they should leave the scene and go back to sleep.

[15] PW8 says that at around 6.00 a.m. he was woken up by someone raising an alarm for help outside as the body of the deceased was discovered. A lot of people responded to the alarm for help and someone called the police. Accused 3 telephoned Accused 2 who was still in South Africa. She advised him that both he and PW8 should remain in her house and not go to the

scene. She said she would be coming home that same day. Indeed at about 10.00 a.m. she arrived.

[16] On the day of the funeral Accused 2 instructed PW8 to remain in her house and not to attend the funeral. She paid PW8 the sum of E1,000.00. Several days after the funeral of the deceased the community police began investigating the deceased's death. They questioned PW5 and PW8. PW3 gave them information that led to his arrest by the police where he implicated PW8 and Accused 3. Accused 3 had already run away to Johannesburg and PW8 fled to Piet Retief where he stayed with Accused 2's brother.

[17] After three weeks PW8 returned to Ngelane and while there early one morning Accused 3 arrived to where PW8 was to perform some traditional cleansing rituals on both of them so that the police would not arrest them for the murder of the deceased. He arrived with a sheep and some muti. The ritual consisted of both of them using the muti with which to vomit and to wash themselves while uttering that the police should not arrest them. They mixed their vomit and washing water and fed it to the sheep. The sheep was then taken to a far off Mkhondo area where they let it go. The idea was that

it would go astray and never be found and likewise the charge of murder would disappear into the unknown.

[18] After the cleansing ritual Accused 3 went back to Johannesburg and instructed PW8 to return to Piet Retief. After two weeks Accused 2, 3 and PW8 returned home from South Africa and found that the police were looking for them. Accused 2 instructed PW8 to leave the country. Meanwhile she and Accused 3 were arrested. PW8 fled to Piet Retief but after a short while Accused 2 telephoned PW8 to leave Piet Retief and go and hide in Ermelo. He did so. When she was released on bail Accused 2 sent him a sum of E500.00 for his rent. She would regularly telephone him to find out how he was. After a while she neglected him and the South African police arrested him and deported him as an alien during September 2013 via Oshoek border gate. He was arrested on the Swazi side after his deportation. He spilled the beans about the death of the deceased. The Nhlanguano police were called to fetch him from Mbabane and he disclosed the whole sorry tale about how the deceased was killed. He says that he did this because Accused 2 neglected him while he was at Ermelo. He further discovered while at the police station that both Accused 2 and 3 had shifted

the blame onto him and had exonerated themselves. He said that he threw the bolt-nut stick in a pit latrine as instructed by Accused 3.

[19] Mr. Manana cross-examined PW8. He put to him that Accused 2 denied any discussion with him to do away with the deceased. PW8 denied this. He was asked when he became aware that he would be a state witness and replied that he became aware during September 2013 when the police asked him to become a state witness. PW8 was asked about a conversation he allegedly had with PW3 while drinking with Accused 3 at Nompumelelo Kunene's home that he complained that he still had not been paid for his part in the killing. PW8 responded that such a conversation never took place.

[20] It was put to him that Accused 2 never discussed the killing of the deceased with him. That instead his name cropped up during a conversation that she had with Accused 3 who informed her that he had hired PW8 to kill the deceased but she refused saying that she did not wish to have anything to do with the matter as she was now residing in South Africa. PW8 denied this and responded that Accused 2 spoke with him directly after she had found a calabash full of muti on her doorstep. She suspected that the deceased had

placed it there. He further responded that Accused 2 had a home at Ngelane which she visited it frequently.

[21] PW8 was next cross-examined by Mr. Dlamini. It was put to him that he was lying that on the day the deceased died Accused 3 made a plan to entice deceased out of his home and to follow him to Accused 2's home. That it was PW8 who went to Accused 3 whom he found sitting under a tree at Nompumelelo's home. It was here that PW8 allegedly told Accused 3 that he had come to kill the deceased and Nompumelelo heard him say so. PW8 denied this.

[22] It was put to him that Accused 3 never gave PW8 his cell phone to use on the night that the deceased died but PW8 denied this. It was put to him that he was lying that Accused 3 had finished the deceased off as he had no reason to kill the deceased as the latter was his girlfriend's uncle and they were on good terms with him. PW 8 was adamant that Accused 3 had participated in killing the deceased and that they were not on good terms as Accused 3 was also a traditional healer and they often competed with the deceased over customers as Accused 3 lived with Nompumelelo at the deceased's homestead.

[23] It was put to him that Accused 3 did not own any sheep but PW8 denied this and even stated that Accused 3 bought some sheep from PW8's home. It was further denied that Accused 3 participated in any cleansing ritual with PW8. PW8 was adamant that Accused 3 performed the ritual and actually brought the sheep. It was put to him that he was implicating Accused 3 in order to get immunity from prosecution. He admitted that he wished to get immunity but that he was also telling the truth that Accused 3 partook in the murder of the deceased.

[24] PW7 Dr. Komma Reddy, the pathologist testified that on the 27th January 2010 he carried out a post-mortem on the deceased and concluded that his death was due to multiple chop wounds to his head. He stated that the injuries were consistent with having been caused by a sharp axe, bush knife or chopper used to cut meat with an object with a sharp cutting edge.

[25] PW6 Lindiwe Kunene testified that she was the biological sister to Nompumelelo Kunene who in turn is a girlfriend to Accused 3. Nompumelelo Kunene has three children with Accused 3.

[26] She stated that PW3 was close to Accused 3. She stated that on the morning that the body of the deceased was found she responded to an alarm that was raised by the woman that found the deceased. The deceased was her uncle. She says that after she had advised her mother she phoned Accused 2 who was in South Africa and told her of the deceased's death. Later on Accused 2 returned home. When asked if Accused 2 and Accused 3 had met to discuss the death of the deceased she replied that they had not done so. At this point Mr. Nxumalo applied that she be declared a hostile witness. I granted the application. Mr. Nxumalo thereafter asked her if she had recorded a statement with the police on the 3rd April 2010. She responded that she had done so and she was invited to tell the Court its contents.

[27] She stated that the police arrived at her homestead after they had arrested Nompumelelo, Accused 2 and 3. She told the police that someone had raised an alarm and her mother sent her to investigate the cause of the alarm. When she did so she found that the alarm was raised by a woman who had found the body of the deceased. She returned home and reported that the alarm was about the death of the deceased.

[28] She says that the police did not believe her story and threatened to lock her up until she told the truth. The police had also arrested another woman called Thobile Kunene whom they threatened likewise. Indeed the police took both women into custody together with their babies. In the cells they found Nompumelelo and Accused 2. PW6 asked these two women why they had involved them in the matter if they had killed the deceased. The two women replied that they did not involve them as they had also told the police that they did not know who had killed the deceased. The police did not believe them either.

[29] She says that because the police were aggressive towards her and threatened to lock her up until she told the truth she became scared she then told them that Accused 3 had come to her house and told her that the deceased was dead. And that he had been killed by Swazi Mdluli who had struck the deceased with a bolt nut stick. This revelation pleased the police and they asked her to tell them more but she replied that was all she knew. That Nompumelelo had given her this information while she was in the police cells with her. The police then released her.

[30] Her statement dated 3rd April 2010 (Exhibit A) was read to her and she agreed that some of the things in it she recalled but could not recall others. She could not recall that she had recorded that after she had informed Accused 2 about the death of the deceased, Accused 2 upon her arrival in Swaziland said that PW6 should not disclose to anyone that Swazi had killed the deceased. Or that Accused 2 had warned her in the presence of Nompumelelo and Thobile Kunene whom she had also warned. She also could not recall having recorded that she had told Accused 2 that it was Swazi who had killed the deceased.

[31] She admitted to Mr. Nxumalo that after Accused 3 was released she went to him and told him that she had recorded a statement with the police in which she disclosed that he had told her that Swazi was the one who had killed the deceased. She also informed the Court that on a date unknown, PW3 and Swazi were having marula beer at her home. They were seated behind the house. She overheard PW8 tell PW3 that he was the one that had killed the deceased. PW8 complained that he still had not been paid even though he had carried out his mandate.

[32] She further testified that later the community police arrived and spoke to PW8. After they had questioned him they called PW3 and questioned him as well. Later on the Royal police arrived and took PW3 away with them. PW8 had left by then.

[33] Mr. Manana cross-examined her and she revealed that the deceased was killed while Accused 2 was in South Africa.

[34] When Mr. Dlamini cross-examined her she revealed that she saw Accused 3 on the day that he went to be remanded. She noticed that one of his front teeth was broken and when he was released he told her that the police had tortured him by cuffing his hands and feet and tubing him until he lost consciousness and when he came to her he realized that his clothes were torn and the police sent to his home for a fresh set of clothes.

[35] PW9, 5074 Detective Constable Jabulane Mhlanga testified that he was the investigating officer in this matter. That when they went to retrieve the body of the deceased on the 24th January 2010, they found a torch and some muti next to it. His investigations led him to the arrest of Accused 3, then

Accused 2 and last PW8. Accused 2 and 3 were arrested during February 2010 and PW8 September 2013.

[36] It was put to him in cross-examination by Mr. Manana that PW5 testified in his evidence in chief that when she was arrested with Thobile Kunene they were stripped naked and searched and were made to sleep in the cells with their small babies. PW9 denied this and stated that they were taken in for questioning and were released on the same day and did not spend the night in police custody. It was put to him that PW5 and Thobile Kunene were harassed and threatened with continued incarceration if they did not confess the truth to the police to the extent that she ended up by making certain admissions which were not true but which pleased the police. He denied any harassment or threats to PW5 and Thobile Kunene.

[37] When it was put to him that Accused 2 was arrested during April 2010, he changed his story of her being arrested during February 2010 to April 2010 saying that he was sorry for the mix up of the dates.

[38] It was put to him that Nompumelelo Kunene, Accused 2 and 3 were subjected to harassment and torture. He denied this.

[39] He was asked when PW8 was arrested and when he was released. He replied that PW8 was arrested on the 13th September 2013 and was released on the 14th September 2013 after having been interviewed by the Public Prosecutor who expressed his intention to use PW8 as an accomplice witness. He changed his tune when he was confronted with the evidence that PW8 was brought to Court to testify on the 5th April 2014 by Correctional officers. He then agreed that PW8 has been incarcerated since 13th September 2013.

[40] Mr. Manana asked PW9 how many times he had visited PW8 in prison. PW9 said that he could not remember. Mr. Manana felt that PW8 had been kept in custody and was constantly visited by the police because they were schooling him to align his evidence with that of PW3 as he had already given evidence and to incriminate Accused 2. That the Crown case was in full swing when PW8 was arrested. PW9 denied this.

[41] In fact according to Mr. Dlamini for Accused 3, 7 Crown witnesses had already been led making PW8's evidence suspect that he was coached with regard to the evidence of the Crown witnesses. It was put to PW9 by Mr.

Dlamini that Accused 3 had told the police when he was arrested he was innocent of this crime . And because he denied knowledge thereof he was severely tortured until he lost one of his front teeth and his shirt was tattered as a result. The shirt in question was shown to the witness who denied that Accused 3 was tortured as alleged. It was put to PW9 that the torture of Accused 3 led to his ancestral spirit being aroused and that PW6 had confirmed this. PW9 denied that they tortured Accused 3. He replied that the ancestral spirits were aroused when Accused 3 was questioned about the death of the deceased and that when they fetched PW6 she confirmed that Accused 3 had ancestral spirits.

[42] It was put to PW9 that as a result of being tortured Accused 3 admitted to a crime that he had not committed. PW9 denied any torture of Accused 3 but concluded that he was taken to the Magistrate to record a confession but when he got there the Magistrate declined to record the confession because Accused 3 informed her that he had been forced by the police to record a confession and that he told her that he did not take part in the commission of the offence. PW9 denied that the police tortured Accused 3 but agreed that no confession was recorded for the reasons stated by Mr. Dlamini.

[43] After PW9 had concluded his evidence, the Crown closed its case and the defence case opened with Accused 2 giving evidence. She stated that when the deceased died she was buzzed during January 2010 by PW6 while she was in South Africa. When she called back PW6 informed her that the deceased had died. She travelled home to Ngelane the following day. She helped with the funeral arrangements and after the deceased was buried she returned to South Africa. During April 2010, PW6 again buzzed and informed her that the police were looking for her about the death of the deceased.

[44] She travelled home during the Easter holidays and the police arrived and took her to the Nhlanguano police station where she was questioned about the death of the deceased. She informed the police that she did not know anything about it. When she said this, a female officer clapped her and a male officer came at her with a black plastic wanting to torture her but she pleaded with him not to torture her as she had operations. He accused her of telling lies as the police had information that she had hired people to kill the deceased and he wanted to torture her so that she could tell the truth.

[45] She denied that she hired PW3 and PW8 to kill the deceased. She denied that she had promised to pay them E2,000.00 to kill the deceased. She denied that she had planned the death of the deceased with PW3, PW8 and Accused 3 and had promised them E40,000.00 to do so. She denied that she gave PW8 the sum of E1,000.00. She admitted that she paid him E300.00 for taking care of her house while she was in South Africa. She denied that she acted in furtherance of a common purpose with Accused 3 to commit the murder of the deceased. She denied playing any role in the death of the deceased. She testified that she was in South Africa when the deceased died.

[46] Mr. Nxumalo cross-examined her. She stated that PW8 was her brother in-law and that she had a good relationship with him. When asked why if she had a good relationship with PW8, he had implicated her in the murder of the deceased. She responded that she had been told by PW6 that the Prosecutor had instructed PW6 to implicate her in order for him to go free. Mr. Nxumalo informed her that PW8 recorded his statement with police on the 14/9/13 and implicated her therein; he even read the relevant portion implicating her. Thereafter she could give no reason why PW8 had implicated her. She denied that she hired PW8 and Accused 3 to kill the deceased.

[47] She was asked about her relationship with PW3 and she responded that she was not related to him nor was she used to him. When asked if she knew of a reason why he had implicated her in the death of the deceased, she said she did not know of any reason.

[48] She was asked how her relationship was with the deceased and she replied that it was good. It was put to her that she was lying that her relationship with him was sour hence her orchestrating that he be killed because she believed that he was bewitching her. She denied this. She was further asked what her relationship with Accused 3 was and she replied that they were used to one another because he was her brother in-law through Nompumelelo his girlfriend.

[49] It was put to her that she was close to Accused 3 and that it was their closeness that made them plan to kill the deceased and to hire PW8 to kill him for the sum of E2,000.00. And that after PW8 had killed the deceased he was paid some money. PW3 was also hired to kill the deceased but had not gone through with the plan. And that she acted in common purpose with Accused 3 and PW8 to carry out the killing with her being the chief

perpetrator. That she initiated the plan to kill the deceased. That after that she kept PW8 away from the police by keeping him in South Africa. She denied all these accusations. It was further put to her that she lied that a police officer had clapped her or that another approached her with a plastic bag intending to torture her. She denied that she had lied.

[50] Accused 3 next gave evidence. He testified that on the 23rd January 2010 he returned to Ngelane from South Africa. That night he slept with his girlfriend Nompumelelo at the Masuku home he did not proceed to his home because it was late. He says that at around 4.00 a.m. PW8 arrived and informed him that he had come to kill the deceased. After that revelation PW8 disappeared and returned some twenty or thirty minutes later to inform him that he had tried to kill the deceased but that he was not dying. He says that Nompumelelo heard this conversation. He told PW8 to leave. After PW8 left he and Nompumelelo went back to sleep. In the morning he heard someone raise an alarm and PW6 came to fetch Nompumelelo and together they went to investigate what was happening.

[51] When Nompumelelo returned she informed him that the deceased had been found dead. He went to the scene and indeed found the deceased dead.

PW8 also joined them at the scene. Someone telephoned the police who came and removed the deceased. He says that the relationship between him and the deceased was fine. After the funeral he returned to South Africa. He returned home during March 2010 as he heard that the police were looking for him in connection with the death of the deceased. On the 1st April 2010, the police arrested him together with PW3, PW4 and Nompumelelo. Accused 2 was already at the police station.

[52] Upon arrival there the police questioned him about the death of the deceased. When he denied any knowledge thereof, the police tied his hands to the back of the chair that he was sitting on with a rope. They placed a large blue glove over his head which covered his face. They placed a plastic bag over the glove and suffocated him and told him that they would remove the plastic bag when he agreed to tell them that he had assisted PW8 to kill the deceased. He says that in the process of him shifting about in the chair he broke his tooth on the steel armrest of the chair that he was sitting in.

[53] Ultimately he lost consciousness and only regained consciousness the following day. When he came to her he found that his clothes were torn and

his tooth broken. He had injuries on his toes. The following day he was taken by the police to the Magistrate to record a confession. He did not record the confession because he told the Magistrate that he did not know the reason for his arrest she declined to record anything.

[54] Accused 3 denied that he and Accused 2 hired accommodation for PW8 in Ermelo. He denied that he finished the deceased off after PW8 had struck him. He identified his torn shirt for the Court (Exhibit DW2 (1)). He testified that he told the police while being interrogated that PW8 killed the deceased. He denied that he performed a cleansing ritual with PW8 using a sheep and muti. He denied ever owning any sheep.

[55] Mr. Nxumalo cross-examined him. Accused 3 was asked why PW8 had come to tell him that he was going to kill the deceased. He said that as far as he was concerned PW8 did not know that he was there. Perhaps he had come to see Nompumelelo. He said that his relationship with PW8 was not good. It was put to him that PW8 had come to him to tell him that it was time to kill the deceased as had been planned earlier together with Accused 2. Accused 3 denied that he was involved in planning to kill the deceased. He was asked what he had done after PW8 returned to tell him that the

deceased was not dying. He replied that he did not do anything. Asked why he did not immediately respond to the alarm that was raised after the deceased had been found dead. He responded that he did not see the need to do so because that home did not belong to him. Besides the woman of that home had already responded.

[56] When he was asked if he had told anyone what PW8 had told him that night he replied that he told his mother in-law Thoko Masuku who is now late but he did not say anything to the police when they arrived to take the body of the deceased away. He only told them that PW8 had killed the deceased on the day of his arrest during April 2010. Asked to suggest a reason why PW8 would implicate him in the murder of the deceased he initially replied that he could not give any reason therefor. Later he said that it was because he had told the police that PW8 had killed the deceased. He denied that he ever partook of a meeting where the killing of the deceased was planned; he denied that he partook of the killing of the deceased in furtherance of a common purpose with Accused 2 and PW8. Accused 3 was asked how his relationship with PW3 was and he stated that he had no relationship with PW3 except that they belonged to the same church.

[57] It was put to him that the reason why he did not inform the police that PW8 had killed the deceased when they came to collect the deceased's body was because he was involved in his killing. He denied this. It was also put to him that the reason that he did not respond to the alarm was because he knew what had happened and the alarm did not surprise him. He denied this. It was put to him that during the killing it was him who finished the deceased off by using a sharp weapon and that is why he had cut wounds on his head. He denied this. It was put to him that he took part in the killing of the deceased because as a traditional healer he did not want the deceased to compete with him for customers.

[58] His response was that he was not a traditional healer it was his father who was and that he used to assist his father. He further denied that he had ancestral spirits. He further denied that the deceased was a traditional healer and said that he was a prophet and that he was employed by the Government.

[59] Nompumelelo Kunene (DW3) next gave evidence. She testified that she and Accused 3 live together and they have children together and that the deceased was her uncle. She lived in the same homestead as him. She says

that on the 24/01/2010 at about 1.00 p.m, Swazi arrived and enquired as to the whereabouts of the deceased. She told Swazi that the deceased was at home. He returned after about an hour and reported that the deceased was refusing with his money. Swazi then told her that he was thinking of killing the deceased. She thought that he was joking and rebuked him but he told her that he was serious. After a while Swazi left.

[60] Accused 3 arrived in the evening and they later went to bed. At about 4:00 a.m. Swazi arrived and asked for the deceased. He left and returned shortly thereafter. She heard him talking at the door saying that he did not know what else to do as the person was not dying and it was almost morning and he did not wish to be found out. Accused 3 responded by telling him to go away and leave them alone. Swazi left and she and Accused 3 went back to sleep.

[61] In the morning they were awoken by people raising an alarm. PW6 came to fetch her and they went to the scene where the people who had raised an alarm were. They found the deceased lying there dead.

[62] She says that around Easter time she was arrested in connection with the death of the deceased. Accused 3 was also arrested. She says that she was assaulted and tortured by the police. So was Accused 3. She says that the police wanted them to say that Sonto (Accused 2) had paid Swazi to kill the deceased. She told them that she did not know anything about what they were telling her to say but they did not believe her. Because she was being assaulted she ended up admitting that Sonto indeed paid Swazi to have the deceased killed and that Swazi and Accused 3 had killed the deceased. Thereafter she was released to go and fetch clothes for Accused 3 who was naked then. When she returned Accused 3 admitted that he and Swazi had killed the deceased after the police had forced him to make the admission.

[63] She says that on the night that the deceased was killed Accused 3 was in the house with her. He did not leave the house all night. He only left in the morning after she had returned with the news that the deceased had been found dead.

[64] When she was cross-examined she stuck to her story about Swazi. She disclosed that when the people gathered around the deceased in the morning Swazi also turned up. She was asked why she did not tell the police when

they came to the scene that Swazi had told her that he would kill the deceased. She responded that she was afraid to do so because Swazi had threatened to kill her if she told anyone about what he had said to her.

[65] She was confronted with the fact that she did not tell the Court that Swazi had threatened to kill her. She responded that she did not know why she had not told the Court. When asked when he had threatened to kill her, she responded that he had done so on the day after the deceased had been discovered. He had asked her if she had told Accused 3 and she replied that she had done so. He then threatened to implicate Accused 3 in the killing of the deceased if Accused 3 ever talked to anyone about who had killed the deceased. It was then that he also threatened her that if she ever informed the police that he had killed the deceased. After her evidence the defence closed its case.

[66] It is clear from the evidence set out above that there was a conspiracy between PW3, Accused 2 and Swazi Mdluli to kill the deceased. PW3 testified that Accused 2 hired him and Swazi Mdluli to kill the deceased and that she would pay them E2,000.00 each for that service. The reason that she gave for wanting the deceased killing was her belief that he was

bewitching her. What further fortified her resolve was that she awoke one morning and found a calabash of muti on her doorstep.

[67] PW3 did not carry out this mandate because he left for his parental house at Siteki with his girlfriend PW5. When he returned from Siteki he found that the deceased was dead and buried and Swazi Mdluli admitted to him that he had killed the deceased but had not yet been paid by Accused 2.

[68] PW3 gave his evidence in a forthright believable manner. He was undaunted by cross-examination. In fact it was while he was being cross-examined by Mr. Manana that certain admissions by Accused 2 were put to PW3 for example that PW3 was introduced to Accused 2 by Accused 3 as the person whom he had found to kill the deceased after he (Accused 3) had failed to kill the deceased by the use of lightning.

[69] Another admission put to PW3 was that when the matter of killing the deceased was discussed Accused 2 stated that she did not have any money and that PW3 would be paid by Accused 3.

[70] A further admission put to her was that while Accused 2 was in South Africa Accused 3 had telephoned her and informed her that he had procured the services of Swazi Mdluli to kill the deceased but that Accused 2 responded that she no longer lived in Swaziland.

[71] The suggestion from the last admission is that Accused 2 had initially wanted to have the deceased killed but had later changed her mind. However, the evidence does not support her change of mind.

[72] PW5, the girlfriend to PW3 corroborated his evidence that he informed her that he had been hired by Accused 2 to kill the deceased but he could not do so.

[73] I am satisfied and the evidence shows that there was indeed a conspiracy to kill the deceased. However, when Accused 2 gave evidence she denied that she initiated the plot to kill the deceased and that she had promised to pay PW3 and PW8. Instead she said that she had a good relationship with the deceased and had no reason to kill him. She did not even allude to the admissions made on her behalf by her attorney nor did she deny these or that she had changed her mind about having the deceased killed.

[74] Swazi Mdluli also corroborated the story that there was a meeting during December 2009 wherein the death of the deceased was planned. The meeting was attended by Accused 2, Accused 3 and PW3. He says that Accused 2 requested PW3 and Accused 3 to kill the deceased and she would pay them E40,000.00 (Forty thousand Emalangenzi). However the plan was abandoned because Accused 2 failed to provide the money that she had promised them.

[75] Swazi Mdluli testified that Accused 2 never abandoned the plan to have the deceased killed. He says that during early January 2010, Accused 2 telephoned Accused 3 from South Africa where she was residing. Mdluli was also present. Accused 2 reminded Accused 3 of their plan to kill the deceased. She said that they should go ahead and she would pay Mdluli E1,000.00 and Accused 3 would pay Mdluli another E1,000.00 and another unnamed relative would pay Mdluli an additional E1,000.00 bringing the total to E3,000.00.

[76] I am satisfied that the plan to kill the deceased was never abandoned by Accused 2.

[77] Swazi Mdluli testified that when they killed the deceased, he struck the first blow and Accused 3 finished him off. Swazi hit the deceased with a bolt nut stick and Accused 3 struck him with the iron rod.

[78] According to Dr. Komma Reddy (PW7) the deceased had multiple chop wounds on his head which were consistent with having been caused a sharp axe, bush knife or chopper used to cut meat but definitely an object with a sharp cutting edge. This describes the iron rod as Mdluli said it had a cutting edge like an axe.

Evidence of accomplice witnesses

[79] The defence has challenged the evidence of Mdluli saying that I should treat his evidence with caution. They say that because Mdluli was arrested long after the trial had commenced and was kept in custody for several months before he testified he was clearly schooled by the police as to what his co-accused had said at the police station and also the results of cross-examination of Crown witnesses in court.

[80] That the evidence by Mdluli that Accused 2 telephoned Accused 3 in his presence and the conversation that took place did not come from statements of his co-accused at the police station nor as a result of cross-examination of Crown witnesses. That that the evidence of how the deceased was killed did not come from the co-accused nor as a result of cross-examination of the Crown witnesses. In my considered view the details of the evidence surrounding the killing of the deceased is very authentic and even the police could not have schooled Mdluli in such a detailed manner.

[81] Generally, it is true that courts have to treat the evidence of an accomplice witness with caution. As he or she may have personal reasons for implicating the Accused. In **S v Hlapezula** 1965 (4) SA 439 (A) the South African Appellate Division stated the following:

“It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self-confessed criminal. Second, various considerations may lead him to falsely implicate the accused, for example a desire to shield a culprit or particularly where he has not been sentenced, the hope of clemency. Third by reason of his inside knowledge, he has a deceptive facility for convincing description- his

only fiction being the substitution of the accused for the culprit... there has grown up a cautionary rule of practice requiring (a) recognition by the trial court of the foregoing dangers, and (b) the safeguard of some factor reducing the risk of a wrong conviction, such as corroboration implicating the accused in the commission of the offence, or the absence of gainsaying evidence from him, or his mendacity as a witness, or the implication by the accomplice of someone near or dear to him.”

[82] The above passage was quoted with approval by our Supreme Court of Appeal in the matter of **Jabulane Mzila Dlamini and Another v R** Criminal Appeal No. 16/12. In the case of **Linda Kibho Magongo v The King** Appeal case No. 25/2010 at paragraph 3 the Supreme Court stated:

“The judgment of this Court in **Motsa v Rex**, follows upon the decision of, among others, of Nathan CJ in **R v Mtetwa** where the learned Judge said at 367 B-C 1976 SLR 364 (HC) that: “This is accomplice evidence. In terms of s 237 of the Criminal Procedure and Evidence Act 67 of 1938 a court may convict on the single evidence of any accomplice provided that such offence has by competent evidence other than the single and unconfirmed evidence of such accomplice, been proved to the satisfaction of the court to have been actually committed. The section does not require that there should be corroboration implicating the accused; but nevertheless, as pointed out

by Hoffmann South African Law of Evidence 2nd ed p. 399, corroboration implicating the accused still falls to be considered under the well known “cautionary rule”.

[83] In the case of **Mbulawa John Dlamini & Another v R** our Court of Appeal at page 136 paragraph G stated:

“The evidence of an accomplice must usually be accepted with caution, and although a conviction of an accused is legally competent even though there is no corroboration of the evidence of the accomplice, it is often unsafe to convict on such evidence. I must however stress that even before looking for corroboration, it is necessary to consider whether the evidence of an accomplice is in itself credible”.

[84] It was stated by Hannah CJ in the case of **R v Mandla Homeboy Dlamini** 1982-86 SLR 387, that the Court has to approach the evidence of an accomplice witness in two stages: Is the witness a credible witness? If so, is there credible evidence, independent of that which the witness has given, which implicates the accused and thus corroborates the witness’s account?

[85] In **R v Ncanana** (1948) SA 399 A at pages 405 – 406 it was stated by

Schreiner JA that:

“What is required is that the trier of fact should warn himself, or, if the trier is a jury, that it should be warned, of the special danger of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth. This special danger is not met by corroboration of the accomplice in material respects not implicating the accused, or by proof aliunde that the crime charged was committed by someone.... The risk that he may be convicted wrongly...will be reduced, and in the most satisfactory way, if there is corroboration implicating the accused. But it will also be reduced if the Accused shows himself to be a lying witness or if he does not give evidence to contradict or explain that of the accomplice. And it will also be reduced, even in the absence of these features, if the trier of fact understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of the accused is, in such circumstances, only permissible where the merits of the former as a witness and the demerits of the latter are beyond question.”

[86] In the case of **Hawuzile Maziya** it was said:

“From the foregoing, it is clear that corroboration of an accomplice must be corroboration implicating the accused person in the

commission of the crime and that while the danger of convicting an accused person will be reduced where the latter is a lying witness, the court must appreciate that rejection of his evidence and acceptance of the accomplice is only permissible where the merits of the accomplice as a witness are beyond question.”

[87] It was argued on behalf of Accused 2 who was first implicated by PW3 that the latter’s credibility was shaken as he lied in court that Accused 3 was not his friend and that Accused 3 was not present when the plan was hatched and yet under cross-examination it transpired that they were friends.

[88] It was further argued that Mdluli contradicted the testimony of PW3 when giving evidence pertaining to the planning stage as he said that Accused 3 was present.

[89] In my considered view these apparent contradictions are not material when one looks at the totality of the evidence. Mr. Manana further argued that there is an indication that Accused 2 is being falsely implicated in this case by the witnesses for their own personal reasons and that Mdluli is getting back at Accused 2 for allegedly having abandoned him in South Africa and for shifting the blame on him.

[90] I do not agree with Mr. Manana Accused 2 was not falsely implicated as she is the initiator of the plan to have the deceased killed for bewitching her.

[91] Equally it has been argued on behalf of Accused 3 that Mdluli was not a credible witness because he told the court that he had been hired by Accused 2 to kill the deceased because he was bewitching her and then claimed that Accused 3 also offered him some money to kill the deceased. As far as I am concerned there is no contradiction here because Accused 2 offered to pay E1,000.00; Accused 3 would pay another E1,000.00 and another relative would pay another E1,000.00.

[92] It was further argued on behalf of Accused 3, that Mdluli testified that he struck the deceased first and Accused 3 finished him off. Mr. Dlamini wondered why Accused 3 would hire Mdluli and then participate in the killing himself. The answer is that Mdluli panicked when the deceased failed to die.

[93] Mr. Dlamini further submitted that Mdluli never demanded payment from Accused 3 which fact would suggest that Accused 3 was never involved. It

is possible that Mdluli never demanded payment because Accused 3 ultimately participated in the killing of the deceased. According to the admissions put by Mr. Manana to PW3, Accused 3 introduced PW3 to Accused 2 as the person he had found to kill the deceased after lightening failed and that Accused 3 would pay him as Accused 2 had no money. Accused 3 is alleged to have telephoned Accused 2 and told her that he had secured the services of Mdluli. Mdluli also testified that at a meeting during December 2009, Accused 3 was present wherein Accused 2 requested PW3 and Accused 3 to kill the deceased.

[94] For the foregoing reasons it has been urged upon me that it would be unsafe to convict Accused 3. I believe the evidence of Mdluli and any inconsistencies and improbabilities are not so material as to make me reject his evidence.

[95] Section 237 of the Criminal Law and Procedure Act No. 67/1938 provides as follows:

“Conviction on single evidence of accomplice

Any court which is trying any person on a charge or any offence may convict him or any offence alleged against him in the indictment or summons on the single evidence of any accomplice:

Provided that such offence has, by competent evidence, other than the single and unconfirmed evidence of such accomplice, been proved to the satisfaction of such court to have been actually committed. ”

See also the principles on the cautionary rule relating to accomplices in the case of **S v Masuku and Another** 1962 (2) 375 at 376 - 377

[96] The proviso to section 237 clearly states that the offence must have been proved to have been actually committed by competent evidence other than the single unconfirmed evidence of such accomplice. The unlawful death of the deceased has been proved and there was never any challenge by any of the Accused persons that the deceased was not murdered.

The doctrine of common purpose

[97] The doctrine of common purpose states that the co-accused are liable because they participated in the killing of the deceased with the necessary *mens rea*; in other words they are accomplices or co-perpetrators (*socii criminis*) and their liability falls to be decided on the usual common law principles relating to *actus reus* and *mens rea*. See Burchell and Hunt Vol 1, General Principles of Law.

[98] In the case of **S v Malinga** 1963 (1) SA 692 (A) Holmes JA having found that the appellant's had acted in concert, stressed that the liability of a *socius criminis* is not vicarious but is based upon his own *mens rea* and went on to apply the usual test of *mens rea* to those who had been associated in the common purpose. Association in a common illegal purpose constitutes the participation – the *actus reus*. Association in the common design makes the act of the principal offender the act of all; see **S v Malinga** supra at 695. Such association need not be express, it may be implied from conduct. See **R v Safatsa and Others** 1988 (1) SA 868, **Philip Ngcamphalala and Others v The King** Appeal Case No. 17/2002 (unreported), **Mongi Dlamini v R** Appeal Case No. 8/2009 (unreported).

[99] The argument presented on behalf of Accused 2 is that she divorced herself from the plan after PW3 chickened out and PW8 had been procured by Accused 3 and that this did away with her *mens rea* to commit the offence and that the requirements as set out in the Ngcamphalala and Dlamini cases do not apply to her. That there is no evidence showing that she paid anyone for killing the deceased. And that the Crown has failed to prove common purpose against Accused 2.

[100] The Crown on the other hand contends that it has been successful in proving its case beyond reasonable doubt. That it has proved that all the accused persons acted in furtherance of a common purpose in unlawfully and intentionally killing the deceased as there was a prior agreement to murder him. The Crown also submitted that the evidence of a single witness Swazi Mdluli who testified as an accomplice witness was credible and satisfied the provisions of section 237 of the Criminal Procedure and Evidence Act No. 67/1938. I agree.

[101] It is clear from the evidence set out above that there was a conspiracy between PW3, Accused 2 and Swazi Mdluli to kill the deceased. PW3 testified that Accused 2 hired him and Swazi Mdluli to kill the deceased and that she would pay them E2,000.00 each for that service. The reason that she gave for wanting the deceased killing was her belief that he was bewitching her. What further fortified her resolve was that she awoke one morning and found a calabash of muti on her doorstep.

[102] PW3 did not carry out this mandate because he left for his parental house at Siteki with his girlfriend PW5. When he returned from Siteki he found that

the deceased was dead and buried and Swazi Mdluli admitted to him that he had killed the deceased but had not yet been paid by Accused 2.

[103] PW3 gave his evidence in a forthright believable manner. He was undaunted by cross-examination. In fact it was while he was being cross-examined by Mr. Manana that certain admissions by Accused 2 were put to PW3 for example that PW3 was introduced to Accused 2 by Accused 3 as the person whom he had found to kill the deceased after he (Accused 3) had failed to kill the deceased by the use of lightning.

[104] Another admission put to PW3 was that when the matter of killing the deceased was discussed Accused 2 stated that she did not have any money and that PW3 would be paid by Accused 3.

[105] A further admission put to him was that while Accused 2 was in South Africa Accused 3 had telephoned her and informed her that he had procured the services of Swazi Mdluli to kill the deceased but that Accused 2 responded that she no longer lived in Swaziland.

[106] The suggestion from the last admission is that Accused 2 had initially wanted to have the deceased killed but had later changed her mind. However, the evidence does not support her change of mind.

[107] PW5, the girlfriend to PW3 corroborated his evidence that he informed her that he had been hired by Accused 2 to kill the deceased but he could not do so.

[108] I am satisfied and the evidence shows that there was indeed a conspiracy to kill the deceased. However, when Accused 2 gave evidence she denied that she initiated the plot to kill the deceased and that she had promised to pay PW3 and PW8. Instead she said that she had a good relationship with the deceased and had no reason to kill him. She did not even allude to the admissions made on her behalf by her attorney nor did she deny these or that she had changed her mind about having the deceased killed.

[109] Swazi Mdluli also corroborated the story that there was a meeting during December 2009 wherein the death of the deceased was planned. The meeting was attended by Accused 2, Accused 3 and PW3. He says that Accused 2 requested PW3 and Accused 3 to kill the deceased and she would

pay them E40,000.00 (Forty thousand Emalangeneni). However the plan was abandoned because Accused 2 failed to provide the money that she had promised them.

[110] Swazi Mdluli testified that Accused 2 never abandoned the plan to have the deceased killed. He says that during early January 2010, Accused 2 telephoned Accused 3 from South Africa where she was residing. Mdluli was also present. Accused 2 reminded Accused 3 of their plan to kill the deceased. She said that they should go ahead and she would pay Mdluli E1,000.00 and Accused 3 would pay Mdluli another E1,000.00 and another unnamed relative would pay Mdluli an additional E1,000.00 bringing the total to E3,000.00.

[111] It is my finding therefore that the Crown has proved its case beyond a reasonable doubt. Consequently Sonto Goodness Nkosi (Accused 2) and Khowe Mfanimpela Mbuyisa (Accused 3) are found guilty of murder both having had the intention to kill the deceased. PW8 is hereby indemnified from prosecution.

JUDGMENT ON SENTENCE

- [1] Having convicted the accused I now have to sentence them. In extenuation it is clear that the accused's belief in witchcraft caused them to kill the deceased. A belief in witchcraft has been held by our court's to be an extenuating circumstance in respect of a charge of murder. In *casu* it is my finding that that belief is an extenuation factor herein and I so hold.
- [2] In mitigation I take into account that Accused 2 is a first offender and has no previous convictions. Mr. Nxumalo confirmed this to be correct. Accused 2 is married and has 1 minor child. She is employed as a vegetable vendor from which she makes E1,000.00 (One thousand Emalangeni) per month. She only went to Grade 5 (Std. 3) in education. She is thirty one (31) years old. She was twenty six (26) years old when this incident occurred. She is remorseful is asking for a lenient sentence.
- [3] With regard to Accused 3, I take into account that he is forty (40) years old and that he was thirty five (35) years old when this incident occurred. He has eight (8) children, seven are still attending school and the last born is still at home. He was never formally employed as his level of education is

Grade 4 (Std. 2). He survived on piece jobs. That he was severely tortured by the police to the extent of losing a tooth and his clothes were torn. He has asked the court to be merciful because he is remorseful.

[4] Mr. Nxumalo confirmed the existence of extenuating circumstances namely the belief in witchcraft because of being semi-literate. He acknowledged that even though sentencing was in the discretion of the Court, the Court should not overlook that a life was lost.

[5] I have in addition also taken into account the interests of society, the crime and the accused persons circumstances and I sentence both accused to fifteen (15) years imprisonment without an option of a fine, the number of days that they spent in custody before being released on bail should be deduced from their sentences.

Q.M. MABUZA
JUDGE OF THE HIGH COURT

For the Crown : Mr. M. Nxumalo
For Accused 2 : Mr. N.M. Manana
For Accused 3 : Mr. B. Dlamini