

SWAZILAND HIGH COURT

REX

v

MAGAGULA Sipho
SHONGWE Mthunzi M

Cri. Case No. 33/99

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| <p>CORAM</p> <p style="padding-left: 40px;">CJ</p> <p>FOR THE CROWN</p> <p>FOR THE ACCUSED</p> <p>(1st acc)</p> | <p>:</p> <p>:</p> <p>:</p> | <p style="text-align: right;">S.W. SAPIRE</p> <p style="text-align: right;">Mrs. M. Dlamini</p> <p style="text-align: right;">Mr. J.G. Masuku</p> <p style="text-align: right;">Mr. Mdluli (2nd accused)</p> |
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JUDGEMENT
(06/07/99)

The accused in this matter are two young men. On the information given to me by accused No. 2 they are chronologically older than they appear. It is a sad thing that two men at the beginning of their lives stand charged with the crime of murder.

It is alleged that upon or about 31st October, 1997 and at or near Mshayazafe area in Matsapha in the Manzini Region the accused persons acting in common purpose did unlawfully and intentionally kill

Memezi Dlamini.

When called upon to plead, accused number 1 made a statement, which was equivalent to tendering a plea of, guilty to culpable homicide. This was not accepted and I entered a plea of not guilty for both accused. It was immediately admitted that the deceased was the person named in the charge sheet and that he died as a result of a stab wound. The postmortem report conducted on the deceased it was admitted and accepted as correct by the accused. From this information it appears that the deceased was a person aged 33 years, well built, well nourished and had a height of 165 cm.

The crown called a number of witnesses. The evidence of two of them has to be treated with extraordinary caution. Their evidence is that they were formed a group including the accused persons who were drinking at a bar in Matsapha. The first witness is Sidumo Fish Ngozo and the 2nd witness is Simon Maseko.

The evidence of Fish is that in October 1997 on the date in question he went with the 2nd Accused to drink. They arrived at the drinking place at about 8.50 p.m. and drank until about 11.00 p.m. During that time they were joined by others including No.1 accused. At about 11.00 p.m. they were leaving the drinking place and the deceased came towards the group. Without any warning accused No. 2 grabbed the deceased by his foot and threw him to the ground. Accused No. 2 was unable to completely overpower the deceased and No. 1 joined them, pulled out his knife and stabbed the deceased.

Accused No. 1 left the scene almost immediately.

According to Fish he and the 2nd accused remained on the scene and accused No. 2 attempted to, or seemed to be pick pocketing the deceased who had dropped dead on the ground. Accused No. 2 then joined this witness and they left.

The witness claims to have seen that Accused No. 2 had blood on the left palm of his hand. He was seen to wash it off when two of them then went home and they spent the night together.

Some days later the Police came and picked up this witness who claims to be a friend of accused no. 2. As far as accused no. 1 is concerned he was an acquaintance not a special friend.

Cross-examination did not in anyway detract from the account given by this witness. It was put to this witness that he was not seen there at the place but he denied this and I am satisfied that this witness is a credible person notwithstanding certain reservations I have which I will mention later.

The version of accused No. 1, to which he later testified in evidence was put to this witness and he denied it flatly. This version was that the first accused was attacked by the deceased who was in the company of two other men and upon being attacked was severely assaulted and stabbed by his assailants resulting to an injury in his head. It was also put that when accused No 1 was defending him the knife, which the deceased had produced, fell from his hand. Accused no. 1 gained possession thereof and used it to defend himself. Again all this was denied by this witness Fish

Very little else emerged from his evidence save that when they were arrested, i.e. the 1st witness and the 2nd crown witness who I will deal with later, they were taken to the police station. This witness Fish admits that he was reluctant to speak about what he had seen that evening and it was only after he had been assaulted by the police that he came out with what he now claims to be the true story. The question which arises is how must this evidence of this nature which had been elicited by roughing up the witness, be treated? I have decided that in dealing with his evidence and that of the next witnesses Fana Maseko I must apply caution as if these witnesses were in fact accomplices. I do not accept the witness's version where it conflicts with that of the accused except to the extent that there are other factors, which indicate that the accuseds' version, cannot be true and that of the witness is completely acceptable. I look for corroboration on these disputed points and I examine the accused evidence. If his evidence cannot stand in the light of what emerges independently, I am then to discard his evidence as insufficiently reliable.

Maseko, the second witness also described the gathering at the drinking place. He describes how No. 2 was the first one to leave the drinking place followed by no. 1. He saw a man approach. No. 2 accused was walking well ahead and meets him first. He also saw accused No. 2 grab him by the leg and forced him to fall on the ground. After the man fell the 1st accused produced a knife and stabbed the deceased and then left for home. The 2nd accused left with the 1st crown witness and this witness, Maseko, left with the accused. All this accords with what the witness Fish had said and is in direct contradiction of what the two accused eventually said in evidence.

Maseko went on to recount what happened to him and first accused after the incident, which was described. They went home. On their way they met a man who asked them to accompany him to a shebeen.

Although it was late at night they did so. When they got there they met other people who they did not know. They saw a man who stood up and apparently over-balanced and fell down. Then accused no. 1 tried to pickpocket the person but found him in trouble. The intended victim retaliated and assaulted accused no.1 who was later able to make off but left behind his jacket and his knife. Accused no. 1 denies completely accompanying the witness to the second drinking place and in fact uses the injuries he is said to have got they're to bolster his story of self-defence.

He also claims to have lost his jacket when he was assaulted at the first place. There are two factors which militates against accepting the accused version and which substantiate and corroborate the account given by this witness Maseko.

The first of these is that a woman Phindile Portia Mlaba who was the girlfriend of the first accused gave the evidence. When Julius Khoza came and called her to see Sipho, (1st accused) as he was ill and wounded and had a swollen face and neck, she saw the accused but did not see the stab wound on the head which he claimed to have had. Although one would have expected the accused to have told her of this wound and showed it to her, this did not happen. But he did tell her that trouble started when he stabbed a person and that he and the 2nd accused was present when this happened. He did not claim to have been assaulted or acted in self-defence. She also told of the incidents, which followed and how the accused no. 1 related to her that he was invited to a shebeen some distance away and where he had a second quarrel. He told her that he tried unsuccessfully to pickpocket this person. The intended victim reacted vigorously and he produced a firearm. He told her how he ran away and fell into a ditch and the enraged would-be victim caught up with him and assaulted him. He wanted to take Sipho to the Police station but he managed to run away. This is a remarkable account which tallies with what the previous witness had said and contradicts with what the accused has put up as his defence. She was cross-examined on these issues but she, with conviction, stood by what she had said, more especially that the accused no. 1 had lost his jacket at the second scene and that is the place where he lost his knife. She maintains that the accused told her that the incident at the second place arose when he wanted to rob a man off his money.

If it was necessary further to support this account there is the evidence of Rebecca Gama. She described how she saw accused no. 1 being assaulted outside her house. She approached and asked the one assailant why he was assaulting what to her appeared to be a boy. This man replied that he noticed him putting a hand in his pocket. (He attempting to steal. The accused, according to her, was severely assaulted but he was nevertheless able to stand up and run away. When he left his jacket remained and she let it lie where it was. The failure to take the jacket into safe custody is described as a weak feature of her evidence especially in the light of the fact that she found a knife and took that into her possession. I do not think that her failure to take possession of the jacket detracts anything from her evidence, which accords not only with what Maseko has said and what the accused admitted to his girlfriend.

She described her delight at finding a knife early the next morning because she did not have one in her kitchen and she in fact used it to chop up cabbage. She told how Police Officers arrived with the two accused and when she had produced the knife the Police asked the Accused No 1, if he knew anything about the knife, he confirmed that it was his.

It was her opinion that the man assaulting the accused appeared to be drunk.

Of course the next morning the jacket was not where it had been left. This is not at all surprising. Her evidence similarly I find credible and was given in a forthright manner. What is of course important is that it accords as I have observed with the testimony of the other two previous witnesses.

The next witness was Tami Nhlanhla Mngomezulu. He described how late in the evening the accused came and knocked at his door and asked him to take him to his house. He discussed the incident, which gave rise to him coming at that time of the night, and the accused said that he quarreled with a person and did not tell him how it started. He was asked about the knife and the accused had no difficulty in telling this witness that the knife was in the inside pocket of a jacket. This again is in accord with what the previous witnesses said.

The next witness was Machawe Gembe. He was a neighbor of accused no. 1 Sipho Magagula. The day after the incident accused no. 1 informed him that he had an injury. He too says that when an explanation was given by accused no. 1 he admitted that he had tried to rob and stab. It is also important that he too did not see any knife wound.

The prosecution then began to lay the ground for the production of a statement made by accused no. 1 to the Magistrate. Bearing in mind the onus on the crown of proving that the statement was made freely and voluntarily and that the accused was not induced thereto by any improper pressure, the *voir dire*. Which I

commenced was interrupted and Mrs. Dlamini for the crown informed me that she was not proceeding with this aspect of the evidence. In view of the statements by crown witnesses that they had been manhandled there would always be some doubt as to whether improper influence had not been brought on the accused no. 1 which induced him to go before the Magistrate. I mention this merely for the sake of completeness and no inferences one way or the other can be deduced from the incomplete evidence, which was led on this aspect of the matter.

I do not deal therefore with the evidence given by various persons as to events which took place save to point out that Constable Themba Dladla confirmed that the knife was found at Rebecca Gama's homestead at Sigodvweni area behind the Police Camp. He too denied that the account of an assault on accused no. 1 at the first drinking place was completely unknown to him.

Both accused persons gave evidence as portended by the cross-examination. Accused No. 1 gave further details as to what happened. But the important thing is that he completely denies that he went to the second drinking home and that that is where he lost his jacket and knife. And as I have said the compelling body of evidence given by independent witnesses in addition to the first two crown witnesses makes it safe to find that the accused's account is a tissue of lies and that there is no truth in it beyond reasonable doubt. His counsel was constrained to put to everyone of his independent witnesses that they were lying as their evidence could not be reconciled with the account given by the Accused persons, but ore especially N01. Any motivation for such lying is completely absent.

As far as accused No. 2 is concerned his account is also in conflict with the two crown witnesses who were present. But his account is also dependent on the truthfulness of the account given by accused no. 1. As accused no. 1's evidence is to be rejected, so does that of accused no. 2.

The next question, which I have to address, concerns accused no. 2. He is charged with murder and the basis of the charge is an allegation of common purpose. The basis of the common purpose argued by Mrs. Dlamini is that it was accused no. 2 who first assaulted the deceased by dragging him by the leg and throwing on the ground. She was constrained to agree that there is no evidence of any prior agreement between the accused either to rob or to attack people. On the evidence a reasonable interpretation of the evidence accused no. 1 entered into the fracas with fatal results but he was uninvited. But it is argued that the fact that the accused ran through the pockets of the victim indicates that the parties formed a tacit agreement to rob the man. All this is not convincing however and the acceptable evidence given by the crown witnesses is in my view the correct verdict as one of assault with intent to rob.

He is found guilty accordingly.

As far as accused no. 1 is concerned there is a clear evidence that he stabbed this man while he was down and that he did so at least reckless as to whether his action would have fatal results or not. The stab wound was directed at the lower chest of the deceased and at that time the consequence that death might ensue should have been present to the accused. The intent to inflict a serious wound, which could cause death, is clearly present and the accused must accordingly be found guilty of murder. He is found guilty of murder as charged.

SENTENCE

ACCUSED NO. 2

I have found that the death of the deceased cannot be attributed to the acts of this Accused person. His conduct is nevertheless serious demonstrating as it does a contempt for the rights of others. To attack innocent strangers in the street late at night is the conduct of a hooligan. The public must be protected from persons such as this. The consequences of indulging in such lawlessness must be sufficiently serious to serve as a warning to others, and as a lesson to the perpetrator.

In his case and for the nature of his crime he will be sentenced to 3 years imprisonment, which

will be deemed to have commenced on the date of his arrest, which is 5th December 1997.

ACCUSED NO. 1

You have been found guilty of murder and the fact that there are extenuating circumstances makes the passing of a death sentence, otherwise compulsory, optional. sentence. I do not think that in your case the death sentence would be appropriate.

You are a young man. On the other hand yours was a vicious attack on a defenseless person and who had given you no offence. You have not given any evidence or suggested that you are sorry for what you have done. In fact your behavior in court suggested arrogance to me. You have not come and apologized either to the family of the deceased or expressed any regret to the court or authorities.

It worries me to have to send a young man like you with no record to jail where you are going to meet undesirable characters to say the least. It is also unfortunate that your weakness will make you a victim of these people. Your regret if anything is to your arrest and being for being found out. Yours is not the reactions a person who is sorry for evil done. What you have done cannot be undone. The man you killed will never be restored to his family. The public cannot see a person like you once again in the streets of Manzini in a few years after you have done something like this.

The minimum sentence I can impose upon you is imprisonment for 12 years. You are sentenced accordingly. The sentence will be deemed to have run from the date of your arrest, which is 5th December 1997.

S.W. SAPIRE, CJ