



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIMINAL CASE NO. 247/2002

In the matter between : REX VS

SIMANGA LUPHONDVO NHLABATSI MBAZO
MKHETFWA DLAMINI THEMBA CHARLES
TSABEDZE MHLONIPHEKI SICELO DLAMINI
JOHANNES SHONGWE MAXWELL
MNGOMETULU NDIPHETHE DLAMINI

CORAM

SHABANGU AJ

FOR THE CROWN
FOR THE DEFENCE

MR MASEKO
MR MAGONGO

SENTENCE 5"
May, 2004

The accused persons were indicted before this court, on several counts including murder, assault with intent to do grievous bodily harm and kidnapping. The first accused who was charged with murder "in that upon or about 23" August. 2002 and at >r near

Malkerns area in the Manzini District, the said accused did intentionally and unlawfully kill Simanga Dlamini.", pleaded guilty to Culpable Homicide and the crown accepted the plea. This is the only count in which the first accused was involved.

On count two, accused numbers two, three and six were charged with attempted murder⁻ⁱ in that upon or about 22nd and 23rd August, 2002 and at or near Malkerns area in the Manzini district and Nisela Farm, N'soko in the Lubombo district respectively, the said accused each or all of them acting jointly and in furtherance of a common purpose did unlawfully and with intent to kill assault and torture Elphas Mbuso Nhiabatsi and did thereby commit the crime of attempted murder. Count three is formulated in the same terms as count two except that in count three the person who is alleged to have been the object of the assaults and torture is one Velinjani Nkosinathi Sangweni and not Elphas Mbuso Nhiabatsi. Both counts two and three were not pursued in relation to the first accused against whom the two counts were withdrawn. Accused numbers two, three and six tendered a plea of guilty to assault with intent to do grievous bodily harm on the two counts and the plea was accepted by the crown.

Count four a charge of kidnapping was withdrawn against all the accused, whereas five which was a charge of kidnapping was pursued against accused numbers two, three and six. On this count, which was withdrawn against the first and fourth and fifth accused, the second, third and sixth accused were charged with kidnapping "in that upon or about 22nd or 23rd August. 2002 and at or near Nisela Farm N'soko area in the Lubombo district, the said accused each or all of them acting jointly and in furtherance of a common purpose did unlawfully and intentionally deprive Elphas Mbuso Nhiabatsi a male adult of his liberty by unlawfully imprisoning the said Elphas Mbuso Nhiabatsi in a house for a period of two days." The said second, third and sixth accused pleaded guilty to the charge of kidnapping.

The person who would have been accused number five, that is Johannes Shongwe. died before the scheduled trial date and consequently the charges were withdrawn against him. The crown further withdrew all charges against Mhlumliem Sicelo Dlainiui who A as

accused number four. The crown stated in court that the reason for withdrawing the charge against Mhlonipheni Sicelo Dlamini is because he absconded and could not be traced for purposes of summoning him or notifying of the scheduled date of trial. All charges were also withdrawn against one Ndiphethe Dlamini who is listed as accused number seven in the indictment. The reason" for the withdrawal of charges against this person seems to do with the perception by the crown that his only role in the whole matter was to simple drive the vehicle in which the complainants were transported. Count six was also withdrawn against the accused persons.

The parties handed in a statement of agreed facts in respect of all the counts. The statement of agreed facts states the following, namely that there was a robbery which occurred at a Marlkerns farm owned by one Kenneth Forbes. During the said robbery three firearms, ammunition and E5000-00 cash were taken. The matter is said to have been reported to the Police who commenced and conducted their investigations. The Forbes family also conducted their own investigations in relation to the robbery. The family engaged security guards from Nisela Safaris, a game farm owned by one Barmy Forbes who is a brother to the aforementioned Kenny Forbes. The security guards who were engaged from Nisela Safaris were charged jointly as accused numbers one to seven according to the indictment. The statement of agreed facts further states that accused number seven was employed as a driver at Nisela Safaris and that he transported his co-accused during the commission of the offences. The person who was accused number five according to the indictment, one Johannes Shongwe was the Supervisor of the other accused persons at their place of employment which was Nisela Safaris. The said Johannes Shongwe is now deceased.

There were three suspects who were apparently identified by the accused persons during their investigations. The names of the suspects to the robbery committed at the Forbes family farm in Malkerns were Simanga Dlamini, Velinjani Sangweni and Elphas Nhiabatsi. According to the statement of agreed facts these three suspects were assaulted by the accused persons whilst being driven to various destinations. Accused number seven who is identified as Ndiphethe Dlamini's participation in the kidnapping and

assault of the three aforementioned suspects took the form of driving the vehicle in which the suspects were being transported. The accused persons kidnapped the suspects and drove them to Nisela Game Farm where they were being coerced into admitting that they committed the robbery at the Forbes' family farm at Malkerns. When one of the complainants Simanga DIamini reported for duty at Forbes Farm in Malkerns .he was detained by accused number one. The said Simanga DIamini was also assaulted by the other accused who were trying to obtain a confession from him. During the course of the interrogation of the said Simanga DIamini he appeared to have agreed to lead the accused persons towards where the firearms and ammunitions were to be found. All three suspects were driven to the said spot whereupon the said Simanga DIamini was released and allowed to point out the firearm. At that stage the said Simanga DIamini attempted to escape and was shot at three times by the first accused with a 7.62 rifle, an arm of war. One shot hit the deceased on the head who died as a result of the injuries inflicted. The statement of agreed facts further states that when the fired the shots the first accused was acting on the instructions of the fifth accused who was the supervisor of the other accused.

Photographs showing the injuries inflicted upon the deceased and the two other suspects of the robbery were handed in by agreement of the parties and are marked Exhibit B1 to B8. The photographs reveal that the suspects of the robbery were indeed subjected to serious assaults. The killing of the deceased suspect. Simanga DIamini was indeed gruesome. The postmortem report prepared by Dr Komma Reddy and submitted by agreement of the parties describes the cause of death of the deceased suspect, that is Simanga DIamini as being "due to a firearm injury to the head." The report describes the injuries in paragraph twenty of the report as follows;

A/i entry wound of one by one centimetres with inverted margins is present on the back side of the head, in the middle portion, which is 161 centimetres from the back of the left foot. An exit wound of seven by five centimetres, with irregular and averted margins present on the middle of the top of the head. Contusions of one by half and half by quarter centimetres present on the left side of the neck. Multiple contusions are present on the front of the trunk. Frontal, parietal, temporal and occipital bones are shattered. "

Each of the remaining accused persons, namely first, second third and sixth accused were found guilty on the counts to which they pleaded guilty as follows;

1. Accused number one was found guilty of Culpable Homicide.
2. Accused number two, three and six were all found guilty of two counts of assault with intent to do grievous bodily harm and of one count of kidnapping.

In sentencing the accused I should take into account the circumstances surrounding the commission of these offences, their personal circumstances, and the interests of society in ensuring that appropriate retribution is made for the offences. It is also in the interests of society that the court should express society's disapproval for such offences. A sentence should be handed down which is to act as a deterrent against such an offence in the future. In so far as the first accused who has been convicted of Culpable Homicide I have already said that the killing of the deceased was indeed a chilling incident. The weapon that was used was by its nature a very dangerous weapon. The fact that the shot appears to have been directed on the head of the deceased makes the offence even more serious. I however have to take into account the fact that the first accused is said to have been acting on the instructions of his supervisor, one Johannes Shongwe who is now deceased. I further take into account that first accused is a first offender and his other personal circumstances to which I have been referred to by Mr Magongo who argued the matter on his behalf. In the circumstances I sentence the first accused to a period of six years imprisonment two years of which is suspended for three years on condition that the first accused is not found guilty during the period of suspension of having committed an offence in respect of which violence is an element.

In so far as accused numbers two, three and six are concerned they have been found guilty of Assault with intent to do grievous bodily harm and kidnapping. I should take into account that the statement of agreed facts does not appear to distinguish between the accused persons on the basis of any kind of difference in the degrees of participation. The seriousness of the offences is revealed and their commission is aggravated by the fact that the assaults on the suspected complainants extended over a two day period. The same applies to the offence of kidnapping. I take into account the fact they are all first

offenders and the other personal circumstances to which I was referred to by Mr Magongo. I also have to take into account in their favour that the accused are said to have been acting on the instructions of their deceased Supervisor. In the circumstances, accused number two, three and six are all sentenced to a period of three years imprisonment in respect of each count of Assault with intent to do grievous bodily harm. One year of the aforementioned three years imprisonment is suspended for 3 years on condition that each of the accused persons affected is not during the period of suspension found guilty of an offence in respect of which violence is an element. The sentences on both counts of Assault with intent to do grievous bodily harm are to run concurrently. Finally in respect of the count of kidnapping, accused numbers two, three and six are sentenced to a term of two years imprisonment which terms is to run concurrently with the sentences relating to Assault with intent to do grievous bodily harm.

ALEX S  OGE