

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIM. CASE NO.

356/08

In the matter between:

REX

VERSUS

SIBUSISO SHADRACK

SHONGWE NQABA SIFISO

SHONGWE

CORAM

HLOPHE J.

FOR THE CROWN

MR. M. MATHUNJWA

FOR THE DEFENCE

MR. J. M. MAVUSO

JUDGMENT

1. The accused persons appeared before me having been indicted for murder it being alleged by the crown that on or about the 4th January 2007, the said accused, whilst acting with a common purpose, did intentionally and unlawfully kill one Terry Sibabazile Shongwe and thereby committed the crime of murder.

2. When the charges were put to the accused persons they both pleaded not guilty to the charges necessitating that the crown leads evidence to prove the case beyond a reasonable doubt.

3. In an attempt to do so, the crown led the evidence of four witnesses. Otherwise the post-mortem report together with a statement made by the first accused to the Magistrate- a confession- were entered by consent and were marked as Exhibit "A" and "B".

4. To give a sequential background, to the matter, the evidence by the crown revealed that on the 4th January 2007, the deceased

left for work in the afternoon of the said date as he worked as a security guard at a certain market at Mafutseni. When he left for such work the accused was wearing a blue two piece overall, under the top of which he was wearing a t- shirt with blue and red stripes. He also wore blue and white sneakers whilst he was carrying a khakhish jacket together with a maroon woollen hat. According to one Julayikhema Gama, PW2, who introduced herself as the mother of the deceased, the latter did not come back home on the morning of the 5th January 2007 as was expected of her. Efforts to find his whereabouts proved futile resulting in his being reported to the Mafutseni Police as a missing person. This state of affairs continued until after about six months later when PW2 was approached by a member of the community police by the name of Ndzimandze who enquired from her on a certain Sunday in June 2007, the details on what the deceased wore on the day of his disappearance.

5. This witness was to be later approached by two police officers from Mafutseni Police station that day who informed her that

human remains, with clothes matching those lastly worn by the deceased had been found near a local river. Her son, one Thamsanqa went in her stead to identify the remains and clothes and confirmed to her and the Police that they were indeed those of the deceased, a fact she herself later confirmed at the Mafutseni Police Station.

6. The deceased was 32 years at the time of his death. His remains, which comprised mainly of disjointed bones at the time were kept in a card box and were later taken to the Raleigh Fitkin Memorial hospital in Manzini for post-mortem purposes. The remains were eventually released for burial and were subsequently buried together with the clothes recovered together with them.

7. According to PW1, Mefika Stanley Shongwe, who introduced himself as a biological brother of the first accused person, whilst a cousin to the second accused person, who is a son to his father's brother; whilst at his parental home at Mafutseni, on a

certain day in February 2008, one Thamsanqa Mkhalihi, came to his home. He asked for the first accused, who was however not present at home at that time having gone to school. As they were clarifying this to him, the first accused person, approached the homestead by the gate in his uniform.

8. An argument ensued between the said Thamsanqa Mkhalihi and the first accused where the former accused the latter of having killed his brother Terry. The argument intensified and owing to its seriousness and sensitivity, PW1 sent for a neighbour, Gogo Nkosi to be called so she could intervene as no older person from his home was present at the time.

9. After sitting down with all disputing parties to discuss the matter, it was eventually agreed that the said Thamsanqa was to await the arrival of the elders of the homestead who were away at the time. Thamsanqa however did not wait as he left. This then prompted PW1 to engage the first accused enquiring

what the accusations were all about including their authenticity.

10. It was at this stage that the first accused is said to have admitted to this witness that he and the second accused had indeed killed the deceased including putting forth the following as reasons for the deceased's having had to die. He was told that the three of them had committed a house breaking and theft at one Levion Dlamini's home at Mafutseni where they stole certain clothes. The deceased was allegedly cheated in the sharing of the spoils as a result of which he threatened to report the accused persons to the police. It was for this reason that they then hatched a plan to kill him. This plan involved using a wire with which he was to be tied and chocked around the neck whilst the other one would stab him with a screw driver at the back.

11. They were otherwise going to fetch him at his place of work, where he was a security guard at the Mafutseni market under the

guise that he was wanted by his girlfriend. He was to be lured to some place between a local stream or river and an orchard or garden, which was done. He was later suffocated around the neck using the wire whilst the second accused person stabbed him at the back. It is said the deceased took a short while after which he died. He was told that they then dragged his body which was thrown into a donga and covered with soil. As the body had not been properly covered, the second accused had returned to cover it thoroughly the next day whilst the first accused had gone to school as he was a scholar.

12. This version by PW1 was echoed or repeated by PW3 one Dennis Simiso Shongwe, who informed court that both accused persons had approached him sometime towards the end of January 2007 where they told him that the deceased had died in their hands in the circumstances revealed above. They asked him to direct them to a strong traditional healer or *inyanga* to help them conceal their having "sent the deceased to Abraham above". This he says meant that they had killed the deceased.

They said they feared for themselves as the community had held meetings and suggested that traditional healers be used to sniff out those who had killed the deceased.

13. This witness informed court further that the accused persons disclosed their having, at some stage around June 2007, dug up the remains of the deceased and placed them by the path/ route so that passers by could see it and have the matter brought to the attention of the deceased's relatives for a proper burial, which did materialise.

14. This witness was to subsequently meet one Ndumiso Shongwe, a brother of his around February 2008 in Manzini and asked him about the situation at Mafutseni as he no longer stayed there. He was to discover from the said Ndumiso that Terrence (the deceased) had disappeared which made him conclude that the accused were truthful in saying they had killed him. He was otherwise approached by the police thereafter who asked him to tell them all he knew about the deceased's death which he did.

15. The evidence of PW1 and PW3, in a big way corroborated the contents of the confession made by the first accused and handed in by consent. The first accused had made it before Magistrate Florence Msibi of Manzini. In the said statement/confession, and by way of summary, the first accused person stated that he and the second accused had committed a house breaking and theft offence at the house of Levion Dlamini, the late senior police officer. The second accused gave some of the items stolen therefrom to the deceased. The first accused was later to learn from the second accused that they were now wanted by the police for the house breaking and theft they had committed at the said Dlamini homestead. The reason for this was stated in the confession to be the fact that at some stage, Terrence (the deceased) had told the second accused that he would report them to the police. This was in my view an apparent blackmail by the deceased who did not want to pay for the items he had received.

16. They apparently then decided to kill the deceased and went on to hatch a plan on how best such could be done. The plan involved enticing him from his place of work at the Mafutseni market under the guise that a certain girlfriend of his was calling him. He was then to be suffocated through the use of a wire concerned whilst the second accused would stab him with the screw driver. This plan was eventually carried out. His body was subsequently dragged and thrown into a donga by the riverside and covered with sand and stones. Nqaba (the second accused) is said to have thereafter taken the torch the deceased had, crushed it and threw it into a nearby bush.

17. After sometime, the second accused is said to have told the first accused that his mother had told him that it had been resolved at the Chiefs kraal that an *inyanga* be engaged to find Terry. They then decided to dig him up and put his body by the path so that Terry could be discovered and subsequently buried. He was eventually discovered and buried.

18. The investigating officer, 3501 Detective Sergeant Speedwell Mthembu testified that on or around the 16th January 2007, one Julayikhema Gama, reported at the Mafutseni Police where the witness was based that her son by the name of Terry Shongwe had disappeared. Investigations ensued and six months later, around the 17th June 2007, human remains were discovered next to a river or stream at Mafutseni just below the police station.

19. Some of these remains had not yet been dug up and they had to follow the trail left by the dragging of the discovered bones to a shallow grave where upon digging they were able to pull out the other remains (bones) and the clothes which comprised a khakhish coat, a blue two piece overall, a blue and red striped t-shirt, a maroon woollen hat as well as blue and white sneakers.

20. Investigations ensued until the 24th February 2008 where the first accused was arrested and after a caution in terms of the **Judges Rules** had been administered on him, he voluntarily chose to go and make the confession referred to above to the

Magistrate. The second accused was later arrested whilst at Balegane Prison where he was serving a sentence for an unrelated offence.

21. Both accused, according to this witness led him to the place where the deceased's remains were found. They then led the police to a certain place where they pointed out a crushed silver torch and said it belonged to the deceased, which his mother, PW3, did confirm. The said torch was handed into court as part of the officer's evidence and was marked "Exhibit 1".

22. Not much of the evidence by the crown witness was disputed by means of cross-examination. The case put forth by the defence to the crown witness was simply that the accused had sent the two accused persons to go and steal a bed for him at the late Levion's place. It was put to them that the accused could not however steal the bed but could only steal a few pair of trousers and shirts from the said homestead. This it was contended prompted the deceased to blackmail the accused and told them

that unless they got the bed he wanted, he was going to report them to the police for the house breaking and theft. This it was said left them with no option but to kill the deceased.

23. It therefore was not disputed during cross-examination that the killing of the deceased followed planning by the accused persons on how same was to be carried out and why. The killing of the deceased itself was not challenged as no case was put to the crown witnesses disputing same. The contents of the confession were neither disputed nor challenged. Furthermore, the contentions or testimony by PW1 and PW3 were also not challenged. As at the close of the crown's case, it became clear therefore that any disputing such evidence by the accused persons during the defence would be an afterthought and therefore qualify to be rejected on that point alone and in line with the principle enunciated in the **Dominic Mngomezulu and Others vs Rex Case No. 94/90.**

24. When the accused persons' case eventually began after their attorney Mr. Mavuso rightly indicated they had to go into the witness dock each and take an oath to give their version, their said version differed markedly from the case they had put to the crown witnesses. They each stated that although they had been sent by the deceased to steal a bed for him at Levion's place, they were unable to do so although they managed to get the other items such as the clothes referred to above. When they reported back to him, they said he told them to check him the next day for their money. He had however not disclosed to them the amount of money he was to pay them. This had not been put to the crown witnesses and they confirmed not having instructed their attorney. The conclusion I should reach is therefore obvious and that is to say I should reject such version. In any event, it cannot be real that they could be sent to steal a bed at somebody's home, ignore all the inherent risks for a sum of money they did not even know. Their version in this regard is therefore fanciful and should be rejected on this point alone. It cannot be probably true.

25. When they came for their money on the promised day, he however told them that he did not have it then. They said as it was a weekend they left him and went to attend a certain traditional wedding. On the Sunday of that weekend and whilst they were from the traditional wedding, the deceased came to them and to their surprise spoke harshly to them threatening to report them to the police if they did not get him the bed. They at this stage said nothing about the money they would have come to fetch from the deceased at that point which I again find to be absurd.

26. They said they then hatched a plan to beat him up so as to discourage him from reporting them to the police. They decided to go to his place of work where they told him his girlfriend was calling him by the river, whereat they then assaulted him with a knob stick whilst tying him with a wire around the chest and arms. This again was a new issue which had not been put to the crown witnesses for them to

react thereto. Furthermore, it sought to dispute what had been said in both the versions of PW1 and PW3 as well as in the confession. This version I must reject on the basis of it being an afterthought.

27. They said he allegedly died as a result of their assault and his dying was accidental. Due to panic, they dragged his body into the donga and buried it there with both sand and stones. After panicking for some months, they said they decided to dig out the remains. The panic was mainly caused by the fear that the relatives of the deceased could obtain the services of traditional healers, who would apparently either expose them or bewitch them. I again reject their trying to tone down the act and gruesome manner in which they killed the deceased.

28. Otherwise, after having dug the remains they placed them by the path way so that they could be discovered, which eventually materialised and resulted in the deceased being buried.

29. As indicated above, although the versions by the accused person supported each other, I have no doubt that same had been rehearsed and was certainly not the truth of what happened. This as indicated above, is because they differed markedly from what appeared in the confession and was supported by PW1 and PW3 who were told by the two jointly and severally and respectively of what happened including such versions not being challenged during the testimony by the crown witnesses. For instance, according to PW1 and PW2 the accused had not told them that they had been sent by the deceased to steal the bed for him. In fact, they had said to them that upon return from Levion's place, they had given some of the items to the deceased who however refused to pay them and instead threatened to report them to the police for the housebreaking they had committed at Levion's place. This sounds logical and makes sense as a reason why they felt the deceased had to die and I find as a fact his death was brought about by this fact as opposed to the accident they now claim it was. In fact I for the

versions set out above, reject their version, whilst accepting that by the crown witnesses.

30. In fact I further reject their versions because they did not put them to the crown witnesses to react thereto but instead raised it during their evidence in chief. The position is now settled that such amounts to an after thought. See in this regard the case of **Dominic Mngomezulu and 10 Others vs Rex Case No.94/90.**

31. I accordingly reject the suggestion by the accused that the deceased died accidentally but I find that his death was a result of careful planning by the two accused person following his threatening to report them to the police for the housebreaking and theft at Levion Dlamini's place at Mafutseni; which is the position set out in the confession and confirmed in their versions respectively disclosed to Dennis Shongwe and to Stanley Shongwe.

32. **Section 238 (2)** of the **Criminal Procedure and Evidence Act** provides as follows:-

"Any court which is trying any person on a charge of any offence may convict him of any offence alleged against him in the indictment or summons by reason of any confession of such offence proved to have been made by him, although such confession is not confirmed by any other evidence. Provided that such offence has, by competent evidence, other than such confession, been proved to have been actually committed".

33. The question in this matter is whether other than the confession referred to above there was any competent evidence proving that the offence had been committed as provided in the proviso to **Section 238(2)** of the **Criminal Procedure and Evidence Act 67 of 1938**. According to Hannah CJ (as he then was) in **Annah Dlamini vs Rex 1982-86 SLR 24 at 27**, the question (in such matters) is whether or not there was any confirmation of the Appellant's alleged confession, for if there was, the proviso (to **Section 238(2)**) does not have to be satisfied. In **R vs Blyth 1940 AD 3550** confirming evidence means evidence outside of the confession which corroborates it in some material respect.

34. Besides that there was the evidence by PW1 and PW3 confirming the confessions made to them on different and separate occasions and respectively by the accused persons, there was the evidence of the pointing out of the torch which was said to have been crushed by the second accused after the commission of the offence. The failure to dispute or challenge the evidence by the crown witnesses can only worsen the case against the accused persons in terms of the afterthought principle referred to above.

35. Consequently, there can be no doubt in my view that the crown has been able to prove the case against the accused persons beyond a reasonable doubt. Accordingly, I have come to the conclusion that the accused persons are guilty of the murder of Terry Sibabazile Shongwe.

DELIVERED IN OPEN COURT IN MBABANE ON THIS OF MARCH 2011.

N.J. HLOPHE
JUDGE OF THE HIGH COURT

