IN THE HIGH COURT Off SWAZILAND

In the matter of: Criminal Case No. S.195/82

REX

VS

GENUKA MKHWANAZI

CORAH: NATHAN C.J.

FOR CROWN: DONKOH

FOR DEFENCE: MATHSE

JUDGMENT

(Delivered on 3rd December,1982)

NATHAN C.J.

The Accused is charged with the murder of Mhlalelwa Dlamini, an elderly woman, on or about 29th November, 1980.

The skeleton of the deceased was found on Mavukutu Mountain. Near to it were a walking stick of the deceased, some white beads that she had been wearing, the lid of her snuff box, and on the skeleton was her blanket. A post-mortem examination was performed by Dr. Mgijima of the HLatikulu Hospital. He was unable to establish the cause of death. The remains of the deceased were past the stage of putrefaction. There was dessication of the bones, a piece of the scalp, forearm, legs, feet, and fibrous structures of the body.

The first Crown witness was one Ntunuka Thabede, the wife of Mandlenkosi (or Mandla) Dlamini who was the nephew of the deceased. The deceased used to live with them. Ntunuka told the Court, and this was really common cause, that the deceased used to receive a social welfare grant in Hlatikulu, and her practice was to go to the Accused who was a Chief's runner and he used to accompany her to Hlatikulu to get her pension. She used to break her journey on the outward and return trips at the Accused's homestead where she would spend a night or two.

Towards the end of November 1980 she received a message from some school children that she was wanted at Hlatikulu, and she left Mandlenkosi's homestead on a Tuesday. As usual it was intended that she would go and return via the Accused's place. She was expected to return on the Thursday. She did not return, and on the Sunday Ntunuka went to try and find out what happened to her. She saw the deceased's wife at the home of one Khonta Khumalo and asked her. The deceased's wife spoke in a strange manner and denied that the deceased had ever arrived at the Accused's homestead. Ntunuka reported this to her husband Mandlenkosi and he then went to the Accused to try and find out.

Ntunuka said that she later heard that the body of the deceased had been discovered by a herd boy on the top of the mountain. She went to the scene and identified the body and the articles I have mentioned.

The only other item of any possible importance in Ntunuka's evidence was that the deceased herself was a witchdoctor. Ntunuka was cross-examined in unnecessary detail in regard to her identification of articles of the deceased. I asked the reason for this and was told that it might turn out that it was not the body of the deceased.

Mandlenkosi gave his evidence in a very honest and straight forward manner; and I have no criticism to make of it.

The next witness was Mvana James Mkhwanazi, a nephew of the Accused. Mvana said that about the middle of November 1980 he met the deceased who was in the company of the Accused and his wife at Khotha Khumalo's bar. The deceased was saying that since she had not collected her pension the previous month she and the Accused should go and collect it. The Accused said that would be all right but that he only took people on Mondays and Fridays. This conversation took place on a Wednesday. It appears that it would not have been practicable to go on the Friday because Mvana was going to get married on the Saturday; the ceremonies would have commenced on the Friday evening and the Accused was going to be in charge of these. Mvana said he did not see the deceased at the wedding; but it does not follow that she was not there. As regards the Accused, he had been at the wedding but he had left before the conclusion thereof. I mention this because it is said in an alleged confession by the Accused that the killing took place on the day of the wedding; and if Mvana' s evidence in regard to the Accused leaving the wedding early is correct, the Accused would have had an opportunity to commit the murder.

I should point out that it appears that Mvana was wrong in placing his seeing the deceased at Khotha's bar and the wedding at mid-November. It appears to have been the end of November.

Mvana was asked in cross examination whether the Accused was an inyanga, and Mvana said yes. It was then put to Mvana that

I mention this because in my view it indicates the readiness of the defence to clutch at straws in its defence.

Mandlenkosi Dlamini gave evidence similar to that of Ntunuka in regard to the deceased's practice of going to Hlatikulu via the Accused's homestead and how she did not return at the end of November. He himself went to see the Accused on the Wednesday of the following week and asked the Accused what had happened. The Accused replied that Mandlenkosi was annoying him and that the deceased was at one Shongwe's homestead. The Accused said this in an angry manner and was in a fighting mood. Mandlenkosi explained that he was not fighting but was merely asking what had happened to the deceased. The Accused had to be calmed down by a woman Swenkie Lukhele and by the Accused's son Ntolo. Mandlenkosi went and reported to the Induna and the next day they went to the Shongwe homestead where they did not find the deceased. They then reported to the Police. Mandlenkosi said that as Chief's Runner it would have been the duty of the Accused to search for missing persons, but that the Accused had not done this in regard to the disappearance of the deceased. After about a week the Accused did come and report that the body had been found and recognised. In view of this it is quite inexplicable that the defence should have probed so thoroughly into Ntunuka's identification of the deceased's walking stick and other articles. But I should mention that it had been put to Ntunuka in cross-examination that the Accused would deny that he had reported to them that the body had been discovered. In the result, however, this was not denied, because the Accused did not give evidence.

the Accused would deny this. As in the case of the report to Ntunuka, he did not in the result deny this because he did not give evidence. But I think it is proper to point out, if for no other reason than to try to teach counsel how they should conduct cases, that to set up ninepins just for the sake of knocking them down, makes it very difficult to gather what is the real line of the defence.

What was more pertinent to the defence than the question whether the Accused was or was not a practising inyanga was that it was put to Mvana that there had been ill-feeling between the Accused and a

Crown witness Makhundu Nhleko following upon the Accused's report to the Police of a murder with which Makhundu was charged. Mvana said he was not aware of this.

I found Mvana's evidence perfectly satisfactory. The only point which raised some doubt was why, if the deceased arrived at the Accused's place on the Tuesday it should have been necessary on the Wednesday to discuss with the Accused the journey to Hlati-kulu. But I think there is some force in the Crown's submission that this journey was a big thing in the life of the deceased, who was an old woman, and that it is likely that she would have harked back to it. I am satisfied that there was the conversation to which Mvana testified.

Kellinah Mavuso gave evidence that at the wedding she saw the deceased and served her with drink in the late afternoon. Kellinah was cross-examined in regard to this, but she said, quite convincingly, that she remembered giving beer to the deceased as she had remarked that old women cannot hold the clay pot of beer.

I think that, notwithstanding that Mvana had said that he did not see the deceased at the wedding, it can be accepted that she was in fact there.

I now come to the evidence of Makhundu Nhleko. He is the principal witness for the Crown in the sense that up to this point the evidence against the Accused had been merely circumstantial, but Makhundu was the witness who gave evidence directly implicating the Accused by means of a confession which Makhundu said the Accused made to him.

Makhundu is a nephew of the Accused. He drives a caterpillar truck. He told the Court that on a Saturday in 1981 the Accused came to him at his homestead. After some general conversation the Accused said that Makhundu should find him a snake with no eyes that moves below the ground. (A blind worm?) The Accused said he wanted this because he was worried by a charge he had arising out of the death of the deceased. Makhundu said he did not ask the Accused how he was going to use this snake. He said that at the end he gave the Accused the fat of a python. The Accused went on to say he should help him by giving him some muti. Makhundu told him he did not have muti. This muti was to be for use in the murder charge in connection with the killing of the deceased. Makhundu asked the Accused if he knew anything about the case and the Accused said yes; he and Khotha had killed the deceased and that he, Khotha, Mpini and Ntolo had taken the body and dumped it on the Mavukuthu mountain. They had done this because the Accused wanted his crops to produce more and Khotha wanted muti for his beer-brewing business.

He said the Accused had said this had occurred during the wedding at Mvana's homestead. In the same sentence he varied this slightly by saying the Accused estimated it was about that time. But under cross-examination her said it was not a matter of estimation: that was the actual time that the Accused had mentioned.

Makhundu went on to say that the Accused had related to him how he and Ntolo had unfortunately assaulted Mandlenkosi when the latter had come to enquire about the deceased.

After this conversation the Accused and Makhundu had something to drink.

Makhundu said that the Accused had come to him because he knew that Makhundu had been charged with a similar offence; and the Accused wanted to know what kind of muti Makhundu had used (i.e. to get acquitted). Makhundu said he had used nothing. He said he exerted no pressure or inducement on the Accused to tell him all this - the Accused was merely looking for help.

Makhundu was subjected to a very lengthy, repetitive and at times even unfair cross-examination. But he

acquitted himself extremely well and in the view of myself and my assessors he was not substantially shaken on any material point.

He was asked at length to pinpoint the time when the Accused had the conversation with him that I have set out; and he said repeatedly that he was unable to give a date. Eventually he said that it was about July because he was working at Somhlolo National Stadium. I pause to point out that the murder took place in November, 1980 and that it would have

been July, 1981 that Makhundu was working at the Stadium with his caterpillar truck in preparation for the Jubilee Celebrations. Counsel's next question to the Accused was:-"Is that July 1980?" to which the Accused said "Yes".

This was an unfair trap question because it is obvious that there could have been no such conversation before the murder took place. Immediately asked Makhundu, "Do you mean 1980 or 1981?", and he replied "I think July 1981 because I was moving from Somhlolo and going to Nhlangano".

Defence Counsel continued to try and press Makhundu in regard to this date and also in regard to exactly when he had first heard of the death of the deceased. But he was unable to shake Makhundu and I was impressed by Makhundu's answer to the question, "This was a significant event- why do you have difficulty in remembering when you heard of it?" Answer: Because if one has nothing to do with an event you do not take notice as to when and where it happened."

Makhundu had made a statement to the police after his interview with the Accused and he was asked time and again when this was. He was unable to fix the date; and here again in my view he stood up very well to the cross-examination.

It was suggested to Makhundu that in his police statement he had not mentioned a snake with no eyes. Makhundu said he had mentioned this. He is correct. In the statement which was later put in as an exhibit Makhundu said "Earlier on Genuka (the Accused) asked me if I had parts of the snake that does not see and I told him that I do not have them. I also told Genuka

that I only have the python fats----".

Makhundu was asked whether it was not the Accused who had made the report to the Police in the case in which Makhundu was charged. He said he did not know that. It was put to Makhundu that he knew very well, and that after that trial he had told the Accused that because the Accused had reported him to the Police he was going to "get him". Makhundu said this was a blue lie i.e. a very serious lie. He went on to say in re-examination that the Accused had nothing to do with his arrest in the earlier case and had not given evidence either at the preparatory examinations or at the trial in the High Court.

The position in this regard is that the Accused did give some very formal evidence at the Preparatory Examination to the effect that he had reported to the Police that he had seen a dead body above the kraal of person who was the co-Accused of Makhundu in that earliert trial. This can hardly be regarded as the giving of evidence against Makhundu. At the trial in the High Court the present Accused did not give evidence.

To the extent to which Makhundu's evidence on this aspect of the case is not entirely accurate. I regard this as being of minimal importance.

It was put to Makhundu that the whole of the Accused's conversation with a confession to him is a figment of the Accused's imagination, fabricated in order to "fix" him. Makhundu denied this. This is an aspect of the case in which the Accused's failure to give evidence in denial of Makhundu's evidence must assume

the gravest importance.

Whilst on this topic I may mention that Makhundu said "There was nothing I could do to "fix" him because he had done nothing to me. He told me the story."

It was suggested to Makhundu that he had not told either the Police or the Court that the Accused had warned him not to reveal what the Accused was telling him. In regard to what he told the Police, his statement says, "I at first hid all what transpired between myself and Genuka since he strongly warned me not to part with what he had told me ---". In regard to what he told the Court he said he had been expecting Crown Counsel to ask him about it, but he had not done so. I may say that I attach very little significance to the failure of a witness to come out, of his own accord, with matters pertaining to a relative side-issue, when asked the blanket question "Did you tell the Police (or the Court) everything?"

Under cross-examination Makhundu contradicted his earlier evidence in regard to who was supposed to have killed the deceased. In his evidence in chief he had said the Accused told him it was the Accused and Khotha Khumalo, and in his Police statement he mentioned these two and went on to add that there were two more who had not yet been apprehended, namely Mpini and Ntolo.

I do not consider that this obvious inaccuracy in the course of an over-lengthy and indeed hectoring cross-examination casts any doubt on Makhundu's evidence. I say hectoring because defence counsel gratuitously and without justification as far as I could see put it to Makhundu that he was sweating while giving his evidence.

The length to which the defence was prepared to go in an endeavour to shake Makhundu and cast doubt on his evidence is evidenced by the point made that in his police statement he had said that the killing took place near the garden at Khotha's place, while in cross-examination he had only said that it was near "a" garden.

Makhundu said that he told the Police that the Accused told him he had come to him to get muti because of Makhundu's acquittal in the case against him. This is not borne out by the Police statement; but Makhundu may still be correct in saying that he did tell the Police of this. In any event it appears to me to be a point of only peripheral importance.

The evidence concluded with that of Dudu Zikalala, a Social Welfare Officer at Nhlangano and Hlatikulu who confirmed that the deceased used to come with the Accused to collect her pension on Mondays and Fridays. She had not done so in October 1980 - the witness had sent her a message in November to come, but the deceased did not do so.

At the conclusion of the crown evidence Mr, Mathse applied for the discharge of the Accused on the ground that an insufficient case had been made out to require the Accused to make a defence. I refused the application and stated that I would give my reasons in my main Judgment Mr. Matse thereupon closed the case for the defence without calling evidence. The final arguments for the prosecution and the defence covered much of the same ground as was covered in the application for a discharge; although there are certain aspects that only arise for consideration

at the end of the case as a whole. I will deal with the questions arising which were canvassed in both sets of argument.

Mr. Mathse drew attention to Section 238 (2) of the Criminal Procedure and Evidence Act which provides that a Court trying a 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 other evidence, provided that such confession, been proved to have been actually committed. This section is the counterpart of Section 258 (2) of the South African Criminal Procedure Act 56 of 1955.

It was submitted by Mr. Mathse that the proviso to the section was not satisfied in as much as there was no evidence outside of the confession that an offence had been committed. He pointed out that the medical evidence was unable to establish the cause of death; and he submitted that the deceased who was a witchdoctor might have gone to the Mavukutu mountain to gather herbs and there died of natural causes. He referred to the case of S. v Bengu 1965 (1) S.A. 298 (N).

The answer to Mr. Mathse's submission is to be found in the later case of S v Mbambo 1975 (2) S.A. 549 (A.D.). It was there held that even though there was no evidence aliunde of the commission of an offence, the conviction was valid if the confession was confirmed by other evidence, and that the necessary confirmation might legitimately consist of admissions made by the Accused, whether in or out of Court.

No limitation has been placed upon the words "confession confirmed by other evidence."

It appears to me in the present case that the necessary confirmation is to be found in the circumstantial evidence that was led, and particularly in the Accused's behaviour when questioned by the witness Mandlenkosi Dlamini in regard to the whereabouts of the deceased?

What is this circumstantial evidence? It is that the deceased set out to go to Hlatikulu to collect her money via the homestead of the Accused who would in the ordinary course have been accompanying her. That she was seen at Khotha Khumalo's bar with the Accused and that there was a conversation about the forthcoming journey to Hlatikulu. That she was seen at the wedding on the Saturday and the Accused was also there. That she was not seen thereafter and that her body was found on the top of the Mavukuthu Mountain. That Ntunuka went to the Accused's homestead to enquire about the deceased and was told by the Accused's wife that the deceased had never arrived there. That Maidl nkosi went to make similar enquiries and was greeted by the Accused in an angry and fighting mood and that the Accused endeavoured to put him off the trail by saying that the deceased was at Shongwe's homestead, which turned out to be untrue.

In my opinion this is ample corroboration and confirmation of the confession.

Mr. Mathse also attacked the content of the confession. But there is practically nothing in it that is not wholly satisfactory and acceptable. I have, in dealing with the evidence of Makhundu

mentioned a number of points which were criticised by the defence, but to which perfectly adequate answers were given. It was also suggested that as the Accused had given evidence against Makhundu in the trial of the latter, the Accused would have been unlikely to unburden himself to the Accused. But as I have pointed out, the evidence that the Accused gave at the Preparatory Examination can hardly be regarded as giving evidence against Makhundu. And what is more important, Makhundu had been acquitted in that trial and the Accused may very well have thought that this was due to the influence of some muti possessed by Makhundu. It was also suggested that the Accused would not have confessed to Makhundu about his attack on Mandlenkosi. But there was good reason to do so, because it was that attack that set the ball rolling towards the Accused's arrest on the present charge.

It follows from the aforegoing that the Crown established a sufficient case for the Accused to meet. Now what is the effect of the Accused closing his case without giving evidence? The position is that where there is direct evidence implicating the Accused, his failure to testify must strengthen the Crown case since there is no testimony to gainsay it and therefore less occasion or material for doubting it. See S. v

Snyman, 1968 (2) S.A. 582 (A.D.) at page 588. Compare R v Blyth 1940 A.D. 355 at page 364 in tin.

Where the evidence against the Accused is not direct but only circumstantial, the position is slightly different.

It may be said in general that the failure to give evidence will strengthen any unfavourable inferences which may be drawn from the prosecution evidence. As was pointed out in S v Letsoko, 1964 (4) S.A. 768 (A.D.) at page 776, failure to testify does not in itself raise an inference of guilty; but it will tend to strengthen any adverse inferences which are already there. See S. v Mthethwa, 1972 (3) S.A. 766 (A.D.) at page 769.

The Accused has not denied that he went to see Makhundu and that he made a confession to him nor has he given any evidence to show that Makhundu has been motivated by feelings of revenge or that he has concocted his evidence. There is no onus on the Accused to establish these matters; but as I have indicated, the failure to give evidence in regard to them must strengthen the inferences which can be drawn against the Accused.

Not only has the Accused failed to give evidence, but he has not called his wife or Khotha Khumalo or his son Ntolo to deny the allegations made against them and the Accused in the Crown evidence. I am told that Khotha Khumalo and Ntolo are in custody awaiting trial; but that is no reason why they should not have given evidence in defence of the Accused.

In the present case there is both direct and circumstantial evidence against the Accused. Viewing the matter from the point of view more favourable to the Accused, it must be said that his failure to give evidence strengthens the adverse inferences which can be drawn against. Even viewing the case as one similar to a case of accomplice evidence which requires

an additional sanction in the well-known cautionary rule to be satisfied before there can be a conviction, as was pointed out in Ncanana's case, 1948 (4) S.A. 399 (A.D.) at the foot of page 405, the risk of a wrong conviction will be reduced if the Accused does not give evidence to contradict or explain that of the accomplice. For "accomplice" in the present case read "confession".

My assessors and I are satisfied beyond any reasonable doubt that the Accused is guilty of murder as charged,; and this is the verdict that we return.

C. J. M. NATHAN

CHIEF JUSTICE