

IN THE HIGH COURT OF SWAZILAND

In the matter of

Case No. 176/80

REX

vs.

GEORGE MHLANGA THOLIWE MATHOBELA

JOSEPH KUNENE

CORAM:

D.D. WILL A.J.

FOR CROWN:

MR DOMKOH

FOR DEFENCE:

MR MATSE

RULING ON ADMISSIBILITY OF EVIDENCE

JUDGMENT

WILL A.J.

(Delivered 17th March, 1982)

A question was put to LaMagongo by Counsel for the Crown to which, according to the summary of evidence, a reply could have been expected that on a Monday prior to the killing of the Deceased Phineas Simelane visited her and offered to buy the Deceased, who was her mother-in-law, from her for two heifers. Defence Counsel objected to the question because the expected answer would be hearsay in respect of the three accused who are appearing before me, and it would therefore be inadmissible.

It was accepted by Defence Counsel that the law on the question is that which is stated in Rex vs Miller and Ano 1959 A.D. 11 as follows:

"An examination of text books shows that there is a well recognised rule that the acts and declarations of one conspirator are

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admissible in evidence against another provided that they are acts performed and made in furtherance, of the common purpose."

Defence Counsel's contention, however, is that the principle only applies if the acts and declarations are within the limits of the common purpose. In order that his contention may be properly understood it is necessary to refer shortly to some of the facts which are before the court either from evidence already given or from the summary of evidence to which both Counsel referred in argument.

There were, according to the witness LaMalindzisa, four meetings at which the details of the conspiracy to kill the Deceased for ritual purposes, were discussed. The meetings took place on four succeeding days from Monday to Thursday. The meetings were attended on each occasion by LaMalindzisa and all, or most, of the seven persons who were charged with the murder, four of whom, including Phineas Simelane, appeared before Cohen J in a separated trial. The other three persons are the three accused standing trial before me.

Phineas Simelane approached the witness LaMagongo earlier on Monday on which the first meeting of

the conspirators took place. The object of approaching LaMagongo was to "buy" the Deceased from her for two heifers. She refused to sell the Deceased. On the Wednesday, however, Phineas Simelane again approached LaMagongo and she then agreed to sell the Deceased. At the meeting of the conspirators held later on the Wednesday Simelane announced that LaMagongo had agreed to sell the Deceased for two heifers.

It was contended that the common purpose only commenced with the first meeting of the conspirators on the Monday, and that what happened between /Simelane and LaMagongo earlier in the day did not fall within the mandate of the common purpose because the common purpose had not by then begun.

It was accepted that evidence as to what happened on the Wednesday, when Simelane spoke to LaMagongo, is admissible because the

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common purpose had by then begun.

The point taken by Defence Counsel appeared to me to be academic in view of his admission that what transpired on the Wednesday between Simelane and LaMagongo could be given in evidence, and what happened on the Wednesday was merely a repetition of what had happened on the Monday.

Defence Counsel, however, persisted in his objection for two reasons, the first of which was that he had sound reasons, which would appear later in the case, for objecting to evidence of what happened on the Monday. The second reason was that a ruling was necessary because there would be other evidence from LaMagongo of what transpired after the killing. This evidence, it would be contended, would be of events which took place after the mandate of the common purpose had terminated.

Before I pass on to consider the objection it is necessary to mention that Defence Counsel argued further that in applying the rules applicable to circumstantial evidence, I would not be entitled to draw the inference, as being the only reasonable inference, that when Simelane discussed the purchase of the Deceased with LaMagongo on the Monday the common purpose had already begun. He contended that at that stage on the Monday Simelane may have decided alone to kill the Deceased, or to kill her with conspirators other than those who were charged. I find this argument to be far-fetched but in the view I take of the matter I need say no more about it.

Defence Counsel relied in his argument on what appears in Phipson on evidence 11th Edition paragraphs 263 and 264. It is not clear to me that these paragraphs are authority for his contention in the circumstances of this case. I consider that Counsel is asking me to place too narrow a construction on these paragraphs. The evidence objected to is admissible in terms of the following passage from Taylor on Evidence cited with approval in Miller's Case (supra).

"Still, as a conspiracy need not be established by

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by proof which actually brings the parties together, but may be shown, like any other fact, by circumstantial evidence, the detached acts of the different persons accused, ... on this subject it is difficult to establish a general inflexible rule, but each case must, in some measure, be governed by its own peculiar circumstances."

What took place between Phineas Simelane and LaMagongo was not merely narrative, but was one of the important steps taken in this conspiracy itself by one of the conspirators in furtherance of it.