

IN THE HIGH COURT OF SWAZILAND

CASE No. S. 174/86

In the matter of:

THE KING

VS

1. SALMON THANDO MBUYISA

2. ROBINSON SIBANDZE

CORAM: MR J. A. HASSANALI

FOR THE CROWN: MR M. SIBANDZE

FOR THE DEFENCE: MR D. LUKELE

CHARGE: MURDER

JUDGMENT

DELIVERED ON 2-3-87

Hassanali, J.

The accused are charged with the murder of one Maduze Jacket Shongwe. They pleaded not guilty.

At the conclusion of the Crown case, Mr Lukele appearing for the accused persons, applied for their discharge on the ground that no sufficient case had been made out against them by the Crown. However after having listened to the submissions, I postponed my order for today.

On the 29/8/86 Or. C.R. Mutoka, the Government Pathologist carried out a Post Mortem Examination on the body of the deceased and found the following injuries.

- a) needle like penetrating wound on the midline back of neck
- b) tear of left cerebella lobe and haemorrhage at the back of the brain.
- c) severerly contused thyroid and haemorrhagic epiglottis. This could have been caused as a result of severe grabbing of the throat."

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He said that under cross examination he found bleeding at the base of the skull at the punctured wound at the back of the neck. From these he concluded that the deceased was alive when these injuries were caused. He concluded that the deceased died as a result of intracranial haemorrhage and respiratory failure.

In cross examination he definitely ruled out that the injuries were caused as a result of deceased falling on his back. He further said that the epiglottis was crushed.

I now turn to the evidence of S.J. Bhembe who said that he was the Principal Officer attached to the Matsapa Central Prison. One of his duties was to supervise the prison officers and prisoners. The 1st and

2nd accused were warders at the prison while the deceased was a prisoner serving a jail term of six years.

On the 27/6/86 at about 7a.m. when he did a count of prisoners in Group 5 at the parade ground he found that the number was insufficient for a job. He then selected from the light work group section, including the deceased but the deceased refused to join and work with the others as he said that he was feeling unwell. He then instructed the accused persons to take the deceased and confine him in the punishment cell until his refusal to work was enquired into. Having complied with the order, accused persons returned back within a period of 4 seconds.

He further said that at about 10.30a.m. he visited the deceased at his cell in order to find out his name before charging him for contravention of the Prisons Regulations. He found the deceased to be well and in good health. The adjoining cell, was occupied by another prisoner, one Mhlanga. At about 12.45p.m. the deceased was returned to his dormitory but even at that time he did not mention to him of any assault on him by any prison officers. The next morning at the parade ground the deceased told him

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him (witness) that Mr Fakudze Acting Officer-in-charge had asked him to remain on the grounds. While he was in his office two prisoners informed him that the deceased had fallen down. He found the deceased in the Clinic complaining of a headache.

In cross-examination he said that the deceased at no stage mentioned to him that he was assaulted by the accused persons and if he wished to report any assault, he could have told Mr Fakudze O. I. C. when he met him. The deceased appeared to be quite normal when he saw him on the 26th morning at the parade ground. He also stated that any commotion in the punishment cell would have been quite audible to the person in the adjoining cell.

Timothy Khumalo, another Crown witness stated that he was a prisoner serving an indeterminate Jail sentence, in the Matsapa Central Prison. The deceased and he, shared the same dormitory.

He further stated that on the 27th morning the deceased was taken to the punishment cell by the accused persons and one Sergeant Siphon Dlamini as a result of some misunderstanding between deceased and Bhembe. The accused persons and Siphon Dlamini came back to the parade ground after about 15 minutes. When he saw the deceased 20 later during the lunch interval, he appeared quite normal. When he enquired from him as to how he was, he mentioned that the Swazis were "enslaving him". He said he was made to remove his shirt and trousers and thereafter he was shaken heavily and kicked with boots on the abdomen (kidney region). He saw him for the last time in the toilet on the 28th morning.

In cross examination Khumalo stated that during lunch interval, deceased dished out his own food. He showed no signs that he was feeling unwell. Later he had supper in the kitchen. On the 28th morning, he had his food but showed no signs of illness.

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Joseph Sitole stated that he was a prisoner at the Matsapa Central Prison serving an indeterminate jail term. He knew the deceased who was also a prisoner and shared the same dormitory. On the 27th morning, the deceased was taken to the punishment cell but he saw him during the lunch interval. He saw him later on in the toilet, and noticed that deceased had difficulty trying to carry a certain container of water. When he spoke to him, deceased said that he was beaten up and had pains in the region of his kidney.

M. Dlamini another prisoner serving an indeterminate Jail term said that when he met the deceased on the 28th morning, he complained of severe headache.

On this evidence then, I am asked by the Crown to state that both accused persons are guilty as charged.

It must be remembered that the burden of proving beyond any doubt that the accused persons committed this crime rests squarely on the Crown.

In all the Crown called 6 witnesses but not one of them witnessed any assault on the deceased.

Looking at the evidence, it is clear that the deceased was committed to the punishment cell for alleged insubordination, and was taken there by the two accused persons and Sergeant Siphon Dlamini. According to the Crown witness Bhembe, the accused persons returned to the parade ground within 4 seconds after having confined the deceased to his cell. Sithole, another Crown witness however stated that they took about 15 minutes to return. Mr Nsibandze appearing for the Crown took up the point that 15 minutes was sufficient time for the accused to have assaulted the deceased. I find it difficult to agree with him in view of the

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conflicting evidence given by two Crown witnesses as to the actual time the accused persons spent with the deceased. I also fail to understand as to why one Mhlanga who was occupying the adjoining cell to that of the deceased was not called to give evidence. Had he been called, he might have shed some light on the alleged assault.

Mr Nsibandze also pointed out that since the accused were the persons last seen with the deceased, an inference could be drawn that they were responsible for the assault. I am afraid I am disinclined to agree with him on this point. The evidence has disclosed that Bhembe was the last person who visited the deceased in the punishment cell. Considering this fact it is reasonably possible that he himself may have been responsible for the assault. It is also possible that Sergeant Siphon Dlamini himself may have assaulted the deceased since he was with the accused persons when the deceased was committed to the punishment cell.

It is evident that nearly all the witnesses who saw and spoke to the deceased on the 27th and on the following day maintained that he appeared normal.

It is also significant that at no time did the deceased mention to the Crown witnesses that the accused persons were his assailants.

He only said that he was assaulted.

According to the medical evidence the deceased had severe injuries on his neck and head. But according to the evidence of Khumalo and Sithole, the deceased appeared to have told them that he was assaulted on the abdomen.

Therefore in view of the grave discrepancies in the Crown evidence, I have no other alternative but to uphold the application of the defence for the discharge of the accused persons.

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However I wish to state that though the Crown had failed to make out a sufficient case against the accused, on the medical evidence I have a very strong suspicion that the deceased was murdered at the prison and I believe that it was done by one or more prison officers. The injuries on the deceased definitely suggest that they had been inflicted by a person or persons with professional skill. However the discharge of the accused persons should not deter the relevant authorities from investigating into this matter administratively and taking appropriate action to prevent similar occurrences of this nature in the future. In fact it is a sad reflection on the prison authorities to have allowed such atrocities to take place within the prison walls.

Application for discharge granted. The accused persons are acquitted and discharged.

J. A. HASSANALI

JUDGE

2/3/87