

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIM. CASE NO. 81/92

In the matter between:

THE KING

VS

1. BHEKI BOYCE GALUJA GAMA
2. SIKHATSI MATSENJWA
3. BHEKI RICHARD SHONGWE
4. SIPHO SIMELANE
5. SAKHIWO MICHAEL LONGWE
6. GEORGE LUKHELE

CORAM: DUNN J

FOR ACCUSED A1 MR. S. C. DLAMINI
FOR ACCUSED A3 AND A6 MR. B. MAPHALALA
ACCUSED NOS. 2, 4, AND 5 IN PERSON

JUDGMENT

22ND SEPTEMBER 1993

The indictment in this case consists of 20 counts.

On counts 1 and 2 accused numbers 1 and 6 are charged with the crimes of murder and armed robbery respectively. Both crimes are alleged to have been committed at Mphosi area on the 15th March 1992. It is alleged that in each case, the two accused were acting in furtherance of a common purpose. The deceased in count 1 is Joseph Dlamini a bus owner of Mphosi area. The property which is the subject of the robbery charge consists of -

1. A Nissan light delivery vehicle valued at E45,000.00

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2. A sum of E15,000.00
3. A Berea pistol valued at E1,628.30
4. A Musgrave rifle valued at E3,033.65
5. A .22 rifle valued at E1,254.00
6. A 12 bore shotgun valued at E529.00

On count 3, accused numbers 1 and 2 are charged with armed robbery. It is alleged on this count that the two accused robbed May Dlamini of E16,308.15 at the Swazi Inn, Mbabane, on the 24th January 1992.

On count 4, accused Numbers 1, 3, 4 and 5 are charged with armed robbery. It is alleged on this count that the accused robbed Wellington Mkhombe of the sum of E2,000 and a grinder valued at E630.00 at Siteki, on the 5th January 1992.

On count 5 accused No.1 is charged with assault with intent to do grievous bodily harm. The complainant on this count is Mcoshwa Hlatshwayo and the assault is alleged to have taken place at Mphosi area on the 15th march 1992.

On count 6 accused Nos. 1, 3, 4 and 5 are charged with the crime of assault with intent to do grievous bodily harm. The complainant on this count is Tsotsi Dlamini and the assault is alleged to have taken place at Mphosi area on the 20th January 1992.

On count 7 accused No.1 is charged with the attempted murder of Moses Masina at Mphosi area on the 15th March 1992.

On count 8 accused Nos. 1 and 2 are charged with armed robbery at Siteki on the 1st February 1992. The

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complainant on this count is Sheffield Munro and the property involved is E700.00 in cash and a cash register valued at E3,500.00.

On counts 9 and 10 accused No.2 is charged with the possession of a 7.62 calibre rifle and 4 live rounds of ammunition in contravention of sections 11(1) and 11(2) respectively, of **The Arms and Ammunition Act No. 24/1964** as amended.

On counts 11 through to 20, accused No.1 is charged with possession of various firearms and live ammunition in contravention of sections 11(1) and 11(2) of the Arms and Ammunition Act as amended.

The accused pleaded not guilty to all the charges with which they are faced. I ruled at the close of the crown's case, for reasons given at that stage, that the crown had not made out a **prima facie** case to place accused No.1 and his defence on count 7 (**attempted murder**). Accused No.1 was accordingly found not guilty and was acquitted and discharged on that count.

It is convenient that I deal with the various counts in chronological order. That will be in the following order. Count 4 (robbery of Wellington Mkhombe at Siteki on the 5th January 1992), Count 6 (assault on Tsotsi Dlamini at Mphosi area on 20th January 1992), Count 3 (robbery of May Dlamini at the Swazi Inn on the 24th January 1992), Count 8 (robbery of Sheffield Munro at Siteki on 1st February 1992), Counts 1, 2 and 5 (murder, robbery and assault with intent to do grievous bodily harm at Mphosi

area on the 15th March 1992), Counts 11 to 20 (contraventions of the Arms and Ammunition by accused No.1) and counts 9 and 10 (contravention of the Arms and Ammunition Act by accused No.2).

COUNT 4 : (Robbery of Wellington Mkhombe at Siteki on 5th January 1992

A number of unidentified persons came to the house of Wellington Mkhombe during the night of the 5th January 1992. Mkhombe was not at home. The persons woke up Mkhombe's niece **Nomfundo Makhandanja**, who was asleep in the house and ordered her to show them where Mkhombe was. On being told by Nomfundo that Mkhombe was not at home the persons demanded the keys to the safe from her. Nomfundo indicated that the safe keys were with Mkhombe. The persons then made Nomfundo to sit outside the house and she heard the sound of an angle grinder coming from the room where the safe was kept. The persons whom Nomfundo said were 6 in number then left. Nomfundo later realised that the safe had been opened.

Mkhombe told the court that he received a report of what had happened and found that a sum of E2,000 had been removed from his safe. A grinder which belonged to him and which was kept at this homestead was also found to have been removed.

Sometime thereafter Mkhombe identified his grinder at the Siteki Police Station. The grinder was identified by its serial number which was also reflected on the invoice which Mkhombe received when he purchased the grinder.

It is common cause that the grinder was found lying under a tree at the homestead of the deceased, in count 1, Joseph Dlamini during the night of the 20th January 1992. That is the night during which the offence charged under count 6 is alleged to have been committed. As will be seen when I consider count 6 there is sufficient credible evidence that accused Nos. 1, 3, 4 and 5 were present at Dlamini's homestead at Mphosi during the night of the 20th January 1992. That evidence is however not such as would lead to the conclusion being made that the persons who left the grinder were the persons who removed the grinder from Mkhombe's homestead. The grinder is a fairly big machine and would in my view have been seen by the main witness on count 6 if it had been carried to Mphosi by accused Nos. 1, 3, 4 and 5.

Mr. Wachira for the crown conceded that the evidence led on this count did not prove the offence of robbery charged and particularised on this count. He submitted that accused Nos. 1, 3, 4 and 5 could properly be convicted of the theft of the grinder. Such a verdict would not, in my view be justified by the evidence. The crown has not established a sufficient link between any of the accused and what transpired at Mkhombe's house during the night of the 5th January 1992.

Accused Nos. 1, 3, 4 and 5 are found not guilty they are acquitted and discharged on count 4.

COUNT 6 (Assault on Tsotsi Dlamini at Mphosi area on 20th January 1992)

Tsotsi Dlamini was employed as a bus driver by the deceased Joseph Dlamini. Tsotsi lived at his place of employment at Mphosi. During the night of the 20th January

1992 certain persons came to where Tsotsi was staying and woke him up under the pretext that they required some assistance with their vehicle that had broken down. Tsotsi was forced out of his room and told to go and knock at the deceased's door. Tsotsi was forced to the deceased's door and after he was assaulted, he was forced to knock at the deceased's bedroom window. Tsotsi was told to tell the deceased to throw money out of the house. It is common cause that the deceased and his wife who were in the house realised that Tsotsi was being held to ransom and that the deceased threw several bank plastic bags containing money into the yard. The money was picked up by the attackers and in the process there was an exchange of gunfire between the deceased and the attackers. It is common cause that the deceased managed to shoot one of the attackers on the left side of the body with a shotgun.

The attackers eventually left the homestead and Tsotsi went to report the matter to the Siphofaneni police. Tsotsi told the court that he was taken for medical treatment on the 21st January 1992. No evidence was led of the extent of the injuries he sustained.

It was when the police arrived in the early hours of the 21st January that the grinder referred to under count 4 was found together with a firearm under a tree in the yard of the deceased's homestead.

The crown led the evidence of a **taxi driver, Bongani Freedom Motsa**, to link accused Nos. 1, 3, 4 and 5 with the assault on Tsotsi at the deceased's homestead. Bongani identified Accuseds Nos. 1, 4 and 5 as people that he was hired to transport to Mphosi area in the evening of the 20th January. Bongani was hired by accused No.1 whom he

knew from Manzini. He explained how on the instructions of accused No.1 he picked up the rest of the accused and proceeded to Mphosi area. Bongani dropped off the three accused at Mphosi area at about 9:00 p.m. Accused No.1 told Bongani to return to that spot after an hour. Bongani returned to Manzini but was unable, because of matters he had to sort out with his employer, to keep the time stated by accused No.1. As Bongani was returning to Mphosi he came across accused No.5 walking towards Manzini. Bongani stopped and accused No.5 enquired as to why Bongani had delayed. Accused No.5 got into the vehicle and Bongani continued in the Mphosi direction. Accused No.5 told Bongani to stop at a certain spot from where accused Nos.1 and 4 emerged. The two accused were with a third person who was identified by Bongani as accused No.3. Accused No.3 appeared to be injured on his left side. Bongani enquired as to how the accused had got to that spot and accused No.1 replied that they would inform Bongani later. Bongani was directed to drive towards Siteki. He was told to stop at Mpaka where accused No.1 alighted. Accused No.1 told Bongani to drive to Manzini with the other accused and told him that he would be paid at Fairview in Manzini. Bongani drove towards Manzini. He was asked to drive fast so that the injured man (**accused No.3**) could be taken to hospital. Accused No.3 was dropped off outside the **Raleigh Fitkin Memorial hospital** in the early hours of the morning. Bongani drove accused Nos. 4 and 5 to Fairview.

Bongani's identification of accused Nos. 1, 3, 4 and 5 is beyond and doubt. He knew Accused No.1 well and had met and seen the rest of the accused through accused No.1 in Manzini.

Bongani was an impressive witness. His evidence was not seriously challenged or shaken under cross examination. One could perhaps have some doubts about his evidence of not having made any enquiries as to where the accused were going to and what the purpose of their mission was. In several cases which have been heard in this court however it has been found that taxi drivers appear to concern themselves with their business of collecting money and do not concern themselves with the business of their clients. There can be no doubt, however, that Bongani must have realised overall that the accused had been up to some mischief.

It is common cause that accused No.3 was admitted to the Raleigh Fitkin Memorial hospital. A medical report filed by **Dr. Nacionales** and which was handed in by consent sets out the extent of the shot gun injuries sustained by accused No.3 to the left of his body and in particular his left arm.

Police officers who reported to the deceased's homestead observed some blood stains on the ground which led from the deceased's homestead in the direction of the main tarred road. A green jacket was found in the deceased's yard. The jacket had holes on the left arm and had what appeared to be blood stains.

Accused No.3 made an unchallenged admission to his mother, Florence Mamba, that he had been to the deceased's homestead with friends, on the 20th January 1992. The admission was made at the Mbabane Government hospital whilst accused No.3 was undergoing treatment. The admission was made in the course of accused No.3 explaining to his mother

how he had sustained the injuries to the left side of his body. Accused No.3 did not give evidence. Accused Nos. 1, 4 and 5 gave evidence on oath and denied having gone to Mphosi area on the 20th January.

As pointed out earlier the evidence of the taxi driver Bongani is beyond any doubt true. He transported the accused to Mphosi area. On his return accused Nos.1 and 4 emerged from the side of the road with accused No.3 who was injured.

I find it to have been proved beyond reasonable doubt that accused No.3 was shot by the deceased at the deceased's homestead during the night of the 20th January. I find as a matter of fact that accused Nos. 1, 4 and 5 were with accused No.3 at the deceased's homestead that night. There can be no doubt that Tsotsi Dlamini was assaulted by the persons who came to the deceased's homestead namely accused Nos. 1, 3, 4 and 5 and whoever else might have been with them.

The only problem arising on this count is as to the nature of the assault on Tsotsi. There is in my view insufficient evidence to justify a verdict of guilty of assault with intent to do grievous bodily harm. there is evidence that Tsotsi was merely assaulted.

I find accused Nos. 1, 3, 4 and 5 guilty of common assault on count 6.

COUNT 3 (Robbery of May Dlamini at the Swazi Inn on the 24th January 1992. Accused Nos. 1 and 2).

The complainant on this count gave a straight forward account of the robbery. There is no doubt that the crime was committed. An amount of E16,308.15 made up of cash, cheques and credit card vouchers was taken in the robbery.

May was not in a position to identify the robbers. He did however have a pretty good picture of one of them. The robber in question was shorter and fairer in complexion than his colleague and appeared to have an abnormal left eye. It appears that May gave this description to the police. No attempt was, however, made by the police to mount an identification parade after the arrest of accused Nos. 1 and 2 as the suspects in the robbery. I cannot recall the number of cases in which I have had to deal with the question of the need and importance of identification parades in cases of this nature. It is either that the police do not bother to acquaint themselves with judgments of this court or they are simply not prepared to try and obtain the best evidence available.

The failure to mount an identification parade in this case resulted in the complainant attempting to make the most of a dock identification, no doubt fortified by the knowledge that accused No.2 is now one of the persons charged with the robbery. It has been stated in numerous cases that dock identifications are not reliable and should be discouraged.

The only evidence linking the two accused with the robbery is the evidence of the investigating officer **Detective Inspector Ndlangamandla** who arrested and interrogated accused Nos.1 and 2. According to Ndlangamandla, the two accused led him to a cave in the

Malagwane area on the 4th April 1992. In the cave, the accused pointed out plastic bags containing 1 and 2 cent coins together with wet cheques. The cheques were endorsed by the Swazi Inn and were subsequently identified as having been stolen in the course of the robbery on the 24th January.

The two accused have simply denied knowledge of the pointing out of the coin and cheques. It is clear from Ndlangamandla's evidence that the police had no knowledge of the whereabouts of the coins and cheques and that it was the accused who pointed them out. The two accused have not given any explanation of how they knew of the coins and cheques. In the absence of any such explanation I find that they must have been involved in the robbery.

Accused Nos. 1 and 2 are convicted as charged on count 3.

COUNT 8 : (Robbery of Sheffield Munro at Siteki on 1st February 1992. Accused Nos. 1 and 2).

Sheffield Munro, the owner of a shop and restaurant at **Mzilikazi** in the Siteki area, told the court that there was a sudden burst of gunfire outside his restaurant in the evening of the 1st February 1992. Customers in the shop and restaurant ran out of the premises. Munro and his assistant who was operating the cash register in the restaurant were also forced to flee and take cover from the gunfire. After the shooting, Munro discovered that the cash register had been removed from the restaurant. He estimated that there would have been between E700.00 and E1,000 in the cash register at the time it was taken.

A report was made to the police and sometime thereafter the police showed Munro a broken cash register. Munro was able to identify the broken cash register by its Serial No. **8A833527**. This was the number Munro had obtained from the dealer from whom he had purchased the cash register. Munro's assistant, **Gregory Munro**, confirmed the evidence of the shooting and the disappearance of the cash register,

Detective Inspector Ndlangamandla told the court that he was taken by accused Nos. 1 and 2 to a cattle dipping tank in the Ka-Langa area. Members of the National Fire and Emergency Service were called to the dipping tank and requested to search the bottom of the tank. They did not retrieve anything but a member of the local community entered the tank and retrieved the broken cash register which was later identified by Munro.

Various explanations were made by accused Nos. 1 and 2 when cross examining Inspector Ndlangamandla and in their evidence in chief, of how the cash register was recovered. I accept without any hesitation, the evidence of Ndlangamandla that the cash register was recovered from the dipping tank as a result of the pointing out by the two accused. The pointing out of the cash register is sufficient to link the two accused with its removal from Munro's restaurant.

There has been no direct evidence of any threats to Sheffield Munro to induce submission by him to the taking of the cash register as particularised in the charge. That is not, however, the end of the matter. A firearm was used

inside and outside Munro's restaurant causing the owner and customers to flee to enable the removal of the cash register. This amounts, in my view, to robbery.

I find the two accused guilty as charged on Count 8.

COUNTS 1, 2 AND 5 : (Murder, Robbery and Assault with Intent to do grievous bodily harm at Mphosi area on the 15th March 1992. Accused Nos. 1 and 6).

The deceased, Joseph Dlamini, left home with his wife and three children to attend a church service on Sunday 15th March 1992. He left home at about 11:00 a.m. and travelled in a Nissan light delivery motor vehicle registration No. SD 690 UM. The church service ended at about 1:00 p.m. and the deceased left for home shortly thereafter. The deceased was seated with his wife **Thembani (PW2)** in the cab and the three children were seated at the back. As the deceased turned off the main road into the road leading to his homestead and before reaching his gate a man was seen running from within the perimeter fence towards the gate. Thembani alerted the deceased and the deceased stopped the motor vehicle. As the vehicle stopped there was a sound of a gun on the deceased's side of the motor vehicle. The deceased was ordered out of his vehicle and told to leave the ignition keys in the vehicle. Two of the men, who were armed, escorted the deceased towards his house. The two men repeatedly fired shots into the ground next to the deceased as they walked towards the house. A third man entered the motor vehicle and drove it towards the gate. As the vehicle approached the gate Thembani was ordered to get out and to walk towards her husband. She

realised that the deceased was injured as there was blood on his shirt at the back. When Thembani got to the homestead she found the deceased in distress, seated at the side of the house with the two men next to him. The deceased enquired what the men wanted and they replied that they wanted money. The deceased directed Thembani to go into the house and give the men whatever they desired as his life was finished. Thembani took the keys from the motor vehicle which had by then arrived at the homestead. Thembani opened the house and went into the bedroom followed by two of the men. She was being assaulted by the two men. One of the men had his face covered. In the bedroom Thembani opened the safe and was forced to lie facing down. The man whose face was covered proceeded to remove money from the safe and placed it in a bag. 3 rifles, a pistol and a camera were also removed from the safe. The cash removed from the safe amounted to about **E15,000.00**.

Whilst the safe was being emptied, Thembani heard a shot being fired outside. The two men then left the house and shortly thereafter Thembani heard the deceased's motor vehicle driving off. Thembani waited for a while in the house before going to where she had left the deceased. She found the deceased lying on the ground with his legs outstretched. He was injured on both ears. A report was made to the deceased's relatives and the police. This incident took place at about 2:00 p.m.

Mcoshwa Hlatshwayo (**PW 2 and the complainant on count 5**) was at the deceased's homestead during this incident. He saw the armed men arriving with the deceased. Mcoshwa was made to lie face down under a marula tree at the homestead. He noticed the deceased hands being tied with an

electric cable by one of the men. Mcoshwa was seen looking at what was going on by one of the men and was kicked in the ribs by the men for doing so. Mcoshwa saw Thembani being led into the house. He also heard the man who had remained with the deceased asking the deceased where their gun which the deceased had taken was. Mcoshwa did not hear what reply the deceased gave and the next thing he saw was the man firing at the deceased's head. Mcoshwa got up and ran away to raise the alarm immediately after the deceased was shot. Mcoshwa spent some few days in hospital undergoing treatment following the assault. A medical report was handed into court by consent as part of the evidence of the assault. The report reflected that Mcoshwa was treated for a contusion of the right anterior chest wall.

Thembani subsequently identified the deceased's motor vehicle, 3 rifles, pistol and camera before the police. She exhibited the deceased's permits to possess the the firearms. The permits contain the serial numbers of the firearms. She further produced the registration book in respect of the motor vehicle.

According to the post-mortem report, which was handed in by consent, the deceased died as a result of a gunshot wound of the head. The deceased had gunshot wounds near both ears indicating that a bullet entered near the left ear and exited near the right ear.

The evidence I have outlined and based on the unchallenged evidence of Thembani and Mcoshwa sufficiently proved the commission of the offences of murder, robbery and assault with intent to do grievous bodily harm.

I turn them to consider the evidence led by the crown in support of the allegation that the afore-said offences were committed by accused Nos. 1 and 6. I will deal first with the position of accused No. 1.

Accused No.1 was said by Florence Mamba (PW15) to be a friend of accused No.3. It will be remembered that Florence is accused No.3's mother. Florence as stated earlier had visited accused No.3 at Mbabane Government hospital and had been informed by accused No.3 of the circumstances under which he had been injured on his left arm. Florence was informed that certain of accused No.3's belongings had been left with accused No.1. Florence went to accused No.1's place of residence in Manzini. Accused No.1 was not at home and Florence left a message for him. A few weeks thereafter accused No.1 reported to Florence's work place. A discussion took place between Florence and accused No.1 in which Florence indicated that accused No.3 had a debt to settle for goods he had purchased on hire purchase. Accused No.1 offered to assist in that and also promised to bring accused No.3's belongings to Florence.

Accused No.1 returned to Florence on a Wednesday and gave Florence **E400.00** towards accused No.3's hire purchase account. At that stage Florence told accused No.1 that she had seen a report in the newspaper that the owner of the homestead at which accused No.3 had been injured had been killed. Florence explained her concern as to how the person had been killed. According to Florence accused No.1 confessed to her and told her how the murder and robbery had been committed. Florence was challenged in her evidence to the extent that it was put to her that accused No.1 would deny having confessed to her.

The investigating officer **Inspector Ndlangamandla (PW17)** told the court that accused No.1 was arrested on the 23rd March 1992. His rented room was searched and an amount of **E543.85** was found in an electric stove. Accused No.1 was then taken to the police station for interrogation. On the following day, according to Ndlangamandla, accused No.1 led him to his parental house at Ka-Langa. There, accused No.1 pointed out various spots where the police dug and found firearms and ammunition. A similar pointing out was done by accused No.1 at his parental homestead on a later date and further firearms and a sum of **E4,053.10** in cash were found by the police.

Of the firearms found by the police as a result of the pointing out by accused No.1 **Thembani (deceased's wife)** was able to identify all the firearms which were removed from the safe at the deceased's homestead on the 15th March 1992. Their serial numbers corresponded with the numbers on the deceased's firearm permits.

Ndlangamandla's evidence of the pointing out by accused No.1 is clear and straight forward and stands completely unshaken. I shall refer to it again when dealing with the charges of contravention of the Arms and Ammunition Act by accused No.1.

There is therefore the evidence of the confession made by accused No.1 to Florence and the evidence of the finding of the deceased's firearms in accused No.1's possession within some 15 days of the deceased's murder.

Accused No.1 denied the confession made to Florence. He denied knowledge of the murder and robbery of

the deceased. He explained that all the firearms which were found had been brought to his homestead by one **Jeremiah Matsenjwa** who was to be charged with the accused but has since absconded.

Florence was a most impressive witness. She is an elderly woman who I consider went about seeing to her son's affairs after he was hospitalised. She knew accused No.1 prior to her son's injury. I accept her evidence of having been surprised to learn that the owner of the homestead where her son had been injured had been killed and of the enquiry she made from accused No.1. Accused No.1's concern for accused No.3's well being clearly indicated to Florence that accused No.1 had also been at the deceased's homestead on the night accused No.3 was injured. I am alive to the fact that I am here dealing with the evidence of a single witness and have carefully considered Florence's evidence and that given by the accused. I accept Florence's evidence as the truth. That evidence when considered in the light of the finding of the deceased's firearms at the homestead of accused No.1 leaves no room for any doubt that accused No.1 participated in the murder, the robbery and the assault at the deceased's homestead.

Accused No.6 was arrested by the Siteki police on the 24th December 1992. He went before the Senior Magistrate Siteki, on the 29th December 1992. He made a long and detailed statement to the Senior Magistrate of his involvement with accused No.1 and two other persons through a series of events leading to the murder and robbery at the deceased's homestead along the lines testified to by the crown witnesses. The admissibility of the statement was not placed in issue. The statement was made freely and

voluntarily by accused No.1. What the defence sought to do was to argue that the statement was exculpatory to the extent that accused No.6 had shown in the statement that he had been co-erced into joining accused No.1 and the other persons in the events leading to the murder and robbery. Accused No.6 gave evidence on oath, in court, confirming his statement and his presence and involvement in the events of the 15th March 1992 at the deceased's homestead. His evidence in court was equally detailed and given at some length. Accused No.6's statement is annexed to this judgment and marked 'A'. The camera which was taken from the deceased's safe was recovered by Inspector Ndlangamandla on the directions of accused No.6. As earlier pointed out the camera was positively identified by the deceased's wife, Them bani.

Accused No.6 cannot at the end of the day be heard to complain that he was co-erced and that he acted under duress. He had ample opportunity of breaking away from the rogues he claims he was taken in by. He had ample opportunity after the event of reporting the matter to the police. The statement made by accused No.6 clearly amounts to a confession. The evidence led by the crown clearly proved the commission of the crimes accused No.6 confessed to. Accused No.6 was aware at the time the gang he was in entered the deceased's premises that the deceased was to be shot on sight. The gang remained within the deceased's premises from about 11:00 a.m. when the deceased left for church until his return at about 2:00 p.m. The mission and purpose of the gang must have been quite clear to accused No.6.

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Accused No.6's evidence also touches on accused No.1. According to accused No.6 accused No.1 was present at the homestead of the deceased. Accused No.1 was one of the persons who escorted the deceased from his motor vehicle to his house. Accused No.1 was according to accused No.6 carrying a firearm. Although accused No.6 did not see the actual shooting of the deceased when he (**accused No.6**) came out of the house, he found accused No.1 outside and the deceased lying on the ground. The gang then drove off in the deceased's motor vehicle.

I find accused Nos. 1 and 6 guilty as charged with murder on count 1; robbery on count 2 and assault with intent to do grievous bodily harm on count 5.

COUNTS 11 TO 20 : (Contravention of the Arms and Ammunition Act at Ka-Langa on the 24th and 28th March 1992 by Accused No.1).

As earlier stated accused No.1 was arrested by Inspector Ndlangamandla at Sicelwini area on the 23rd March 1992. Accused No.1 was interrogated and on the 24th March, he led the police to his parental homestead at Ka-Langa. The accused pointed out a spot at the edge of the yard. Ndlangamandla dug at that spot and two plastic sacks were found. In the first sack were -

22 x 7.62 calibre live rounds of Ammunition
(Exhibit 19)

84 shot gun cartridges (Exhibit 29)

In the second sack were -

1 AK 47 assault rifle	(Exhibit 21)
3 Magazines for an AK 47 rifle	(Exhibit 22)
50 live AK 47 rounds of ammunition	(Exhibit 24)
41 x .22 live rounds of ammunition	(Exhibit 25)

The accused led Ndlangamandla to a second spot where another sack was found. The sack contained -

1 AK 47 assault rifle	(Exhibit 26)
1 AK 47 magazine	(Exhibit 27)

A shotgun which had its barrel and butt sawn off was found wrapped in a plastic bag at a third spot pointed out by the accused. A .22 calibre rifle was found at a fourth spot pointed out by the accused.

On the 28th March 1992 the accused again led the police to his parental home. Again the accused pointed to a certain spot. The police dug at this spot and found a tin containing E4,053.10, a Bersa pistol, 17 live rounds of .38 calibre ammunition and a further 10 live rounds of ammunition.

The accused had no permit to possess the firearms and the ammunition. The firearms and ammunition are the subject of the charges on counts 11 to 20.

The explanation given by the accused was that the firearms and ammunition were left at his homestead by **Jeremiah Matsenjwa**. According to the accused Jeremiah left the firearms on a Saturday night. Jeremiah left the homestead on the Sunday morning.

I reject this evidence as totally false. The accused knew where all the firearms were buried. He led the police to the firearms. He did not explain to the police, before pointing out the firearms, that the firearms belonged to Jeremiah. That would have been the simplest thing to do particularly at the stage when the accused was asked to produce a permit for the arms and ammunition. It is common cause that all the firearms were serviceable and that the ammunition is live.

I find accused No.1 guilty as charged on counts 11 to 20.

COUNTS 9 AND 10 : (Possession of a firearm and ammunition by accused No.2 on 6th April 1992).

Accused No.2 was arrested by the Siteki police on the instructions of Ndlangamandla. He was interrogated by Inspector Ndlangamandla. According to Inspector Ndlangamandla accused No.2 led him to his parental home at **Maphungwane** on the 6th April 1992. At the homestead accused No.2 pointed to a certain spot in the yard. Ndlangamandla dug at that spot and found a 7.62 calibre rifle loaded with 4 live rounds of ammunition. Accused No.2 failed to produce a permit to possess the firearm and ammunition.

Ndlangamandla was cross-examined by accused No.2 who denied that any firearm was found at his homestead. It transpired from the cross-examination that there were other persons at accused No.2's home, including his father when the police came with accused No.2. Ndlangamandla replied under cross-examination that accused No.2's father was woken up but that he was not shown what was found at the homestead.


Accused No.2 gave evidence on oath denying all knowledge of the firearm. Accused No.2's (Elliot Matsenjwa) uncle was called to give evidence on behalf of accused No.2. Matsenjwa told the court that he was at accused No.2's home when the police arrived. He explained how accused No.2 was taken out of the police vehicle and ordered by the police to produce the firearm. Accused No.2 led the police to a heap of building sand. The police dug in the sand and nothing was recovered. The policemen went away with accused No.2.

The crown attempted to make much play of the fact that Matsenjwa was not specific as to the date on which this incident occurred. The police had not, however, testified that they had been to accused No.2's homestead on more than one occasion and there is nothing to suggest that Matsenjwa was testifying to a different occasion.

I find it very strange that the police would have reported to accused No.2's father's home, requested to conduct a search and then gone away without having shown accused No.2's father what had been recovered at the homestead. The homestead belonged to accused No.2's father and one would have expected that a report would have been made to him by the police. Accused No.2's uncle's evidence throws doubt on the very brief evidence given by Ndlangamandla, on the finding of the firearm.

The crown has failed to prove the charges on counts 9 and 10. I find accused No.2 not guilty. He is acquitted and discharged on those two counts.

My two assessors, for whose assistance I am indebted, are in agreement with this judgment.


B. DUNN
J U D G E