

IN THE HIGH COURT OF SWAZILAND

Cr. Case No. 143/95

In the matter between:

THE KING

Vs

MBUSO SIMELANE & EIGHT OTHERS

CORAM: S.W. Sapire A.C.J.

FOR THE CROWN Mr. Wachira

FOR ACCUSED 1 2 4 5 6 & 8 Mr.P. Smith

FOR ACCUSED NO. 7 Mr. C. Ntiwane

FOR ACCUSED NO. 3 In Person

Judgment

(20/6/96)

Eight persons appear as accused before the court. All of them are charged on count one which alleges that on or about 18 February 1995 and at or near Shisizwe area in the District of Shiselweni, the said accused persons each or all of them, acting with a common purpose did unlawfully assault Moses Gwebu with knobsticks and a bush knife with the intention of causing him grievous bodily harm.

All the accused, save for number three, Leonard Sibiya are charged with count two which alleges that the accused so charged are guilty of murder in that on or about 18 February 1995 and at or near Shisizwe area in the District

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of Shiselweni, the said accused persons each or all of them acting with a common purpose did unlawfully and intentionally kill Simon Mancane Siyaya.

The events which led up to and preceded the alleged assaults on the deceased and Gwebu were related by witnesses called by the defence and explained the conduct of the accused persons.

Accused number 8 said that the deceased and Gwebu were known to him. Indeed it appears that all the persons involved, both the accused and the victims of the alleged offences are familiar to each other, and family ties bind some of them. The deceased and Gwebu were suspected of stealing some containers and having sold this stolen property. For this accused number 7, the chief in the area had caused them to be arrested by his runners and taken to the police. The two were, for some reasons, not fully explained, released from custody. While however they were escorted by the runners of the chief, passed accused number 8, he loudly observed to the runners that their charges ought to be dealt with summarily for what they had done and it was suggested that physical harm should be meted out to them. This is given as the reason for the ill will which arose between accused number 8

and the deceased. No other reason is suggested.

Later Gwebu and the deceased are said to have accosted accused number 8 and threatened to assault him and to burn down his house. Accused number 8 said that he reported this to the chief who is accused number 7 and the report is said to have been made at his kraal. There, accused number 8 found the indvuna to whom he told the story and the indvuna advised him to use another route from that on which he had accosted by the two miscreants so as to avoid contact with them. The chief also summoned the deceased's father who is apparently one of his councillors and told him to warn his son to desist from molesting accused number 8. Although this aspect of the case is confirmed by both the indvuna, one Ndlangamandla and accused number

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7. Msindvo Siyaya the deceased's father when he gave evidence denied this had happened. His evidence related to events of the night of the 18th February 1995.

Accused number 8's hut was indeed burnt down the next evening in circumstances which strongly suggest arson and worse because the perpetrators of the crime appeared to have jammed or locked the only door to the dwelling to prevent the occupants from escaping the flames. Accused number 8 was however able to break down the door to allow him, his wife Idah and the child of one Xaba to get out of the house. According to Idah, she saw Gwebu and the deceased close to the house hut while she and others were trying to douse the flames with water from a nearby stream. Both accused 5 and accused 8 have no doubt that the deceased and Gwebu were the arsonists, and to this day are bitterly angry and surprised at the acts of those who they firmly believe brought this disaster on them.

Accused number 8 immediately reported to the chief that the threats made by Gwebu and the deceased had been carried out, and was advised by the chief to go accompanied by another to report the matter to the police at the nearest station at Hluti. This number 8 did on the day after the fire, Friday 17th February 1995. There is an entry in the station occurrence book confirming that such a complaint was made. The entry refers to the incident as involving malicious injury to property to the value of some E300. The circumstances outlined above disclose that the offence of which the complaint was made was far more serious. In fact arson and an attempted murder had been carried out. In any event nothing was done about this and the police did not even visit the sight to investigate by late on the following day Saturday. Certainly no arrests had been made.

Accused number 8 also complains that when he was making his statement, the policeman who accepted the charge was taken away from his duties to attend to some private

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matters. By late on Saturday afternoon number 8 accused was convinced that the police were not according his complaint the seriousness it deserved, as no arrests had been made and no other investigations apparently embarked upon, and he renewed his complaint with the chief, accused number 7. By then the chief who had also received complaints from Xaba that the deceased and Gwebu had harrassed or molested him doubtless now felt that action was demanded of him, and that the people who were there viewed a serious miscreants should be dealt with.

According to the chief, he summoned his runners and instructed them to go and arrest the miscreants and bring them to his kraal from where they would be taken to the police at Hluti.

I have outlined these facts attested to by defence witnesses because they are important to understand what happened from here onwards. By reciting them as facts, I do not find that the deceased and Gwebu were indeed guilty of any offences. They have never been tried or found guilty

in that regard, but the importance lies in how the minds of the accused persons especially number 8, were affected.

The scene now shifts to the Siyaya homestead where at about 20.00 hrs Moses Gwebu the complainant on count 1, and Siyaya the deceased on count 2, had retired to sleep in the hut which they shared. There was a loud knocking on the door which was broken down before any time had even been allowed to them to answer the call. The deceased was able to hide under the bed and so avoid the attention of the mob, but Gwebu could not do so and was taken, forcibly, out of the hut where he was assaulted. Gwebu was unable to identify his assailants at that time because of the darkness. He was however taken by them to the chief's kraal (the home of accused number 7). There he recognised all the accused persons and Xaba who was not an accused in this case, he having been tried separately on a

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plea of guilty to the first charge and a plea of culpable homicide on the second. He says he was thereafter assaulted by all the accused other than the chief, accused number 7. He does say however that the assaults took place on the chief's instructions.

Gwebu said that his torture was inflicted while revelry and celebration were the order of the night at the chief's kraal. He was so he claimed, and this was confirmed by witnesses for the defence that he was tied up, later released and the following morning eventually taken by the chief to the police at Hluti where he was detained. He was removed from the cell and taken for treatment for the injuries he had suffered in the assault. In the police van taking him to the clinic he saw the deceased, who was in a bad way having wounds all over the body. Both of them were taken to the Matsanjeni Health Centre where he, Gwebu was admitted and remained receiving treatment for two days. The deceased, died at the Health Centre whilst he was being or awaiting treatment.

The father of the deceased Msindvo Siyaya who had retired to a room near that occupied by Gwebu and the deceased heard the commotion and emerged to see the armed mob dragging Gwebu out of the hut. He tried to get them to act with forbearance but for his pains he was set upon by the group and received a blow with a knobstick from one of them. In his evidence he claimed to have identified the persons comprising the group to include accused persons 1, 2 and 5 as well as Xaba. But for the fact that some of these persons on their own evidence put themselves on the scene his identification of them would not have been satisfactory, especially as Gwebu himself says that the conditions for identification were so bad that he could not recognise his assailants until they had reached the chief's kraal. I do however accept his evidence in so far as the roles of accused 4 and accused 5 are concerned.

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It is quite clear that the group of persons who came to the Siyaya homestead included others apart from the runners who had been instructed by the chief. The two women, accused 4 and 5 were clearly at the scene and I will shortly examine their explanation of their presence.

The case of the accused persons is that the group which set out on the instructions of accused number 7 the chief, had as their mission only the arrest of Gwebu and the deceased. It is claimed that violence was only used in so far as it was necessary to disarm Gwebu of a spear, with which he tried to use in defending himself after three of the party had broken into the hut. The picture which emerges from the evidence is far different.

The medical report of the injuries sustained by Gwebu belie the defence version. These injuries especially because many of them were to be found on the victims back are consistent with a continued or continuous assault. They were clearly not inflicted in a short sharp skirmish with Gwebu

to disarm him of the spear. One must bear in mind that these persons who disarmed Gwebu approached him from the front and the reference to the medical report shows extensive bruising and lacerations and other wounds on the posterior aspect of the complainant's body.

It is true that the following morning Gwebu was taken to the police station by the chief and his assailants. Indeed a spear was handed in, which it is now claimed was tendered as evidence that Gwebu had resisted a lawful arrest and in order to overcome this violence had been necessary.

Spears however are abundant in Swaziland and the production of a spear proves nothing especially as Gwebu denies that he was depossessed of it or that it was his. Moreover the police officer Dlamini to whom the spear was handed said that it was said by the person handing it in that it had been found at the burnt house of accused number 8. The purpose of the handing in of the spear according to him was to connect Gwebu and the

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deceased with the arson. The occurrence book records that it was accepted as evidence in the case of malicious injury to property. Either way the evidence regarding the spear is not at all convincing.

As I have said the extent of the victim's injuries, their situation and nature are not explained or justified by the defence evidence. There can be no doubt that whatever the chief's instructions may have been, the group went far beyond whatever legitimate purpose the chief may have intended. This group proceeded to punish the victim for the crime or crimes they believed had been committed. I find that Gwebu was indeed assaulted by this group at the Siyaya homestead along way back to the chief's kraal and at the chief's kraal, and that the persons who participated in this assault were acting with a common purpose.

The question now is which of the accused persons now before court participated in the commission of the offence.

Accused number 1 was clearly identified by Gwebu as a participant in the assault. Accused number 1 however claims that he was not present and that he was at home of his parents on the evening in question. Can this unsubstantiated alibi be accepted? One must bear in mind that the attack on Gwebu and the later attack on the deceased which is the subject matter of the second count are different episodes of the same series of events. Not only was it Gwebu who identified No. 1 as one who assaulted him, this evidence is corroborated as I have said by that of the father of the deceased.

Whatever criticisms I may have of Siyaya's evidence, whatever reservations I may have in accepting it, his identification of persons present is confirmed by the very evidence of those persons themselves.

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But the point of the matter is that accused number 1 in relating how the deceased was found by him clearly wished to distance himself from any search party. He gave a version which I find difficult to believe, but what is more important is he was seen by the witness Sibongile who clearly identified him as part of the search party which set up purposefully to find the deceased the following morning.

The accused would have it that he found the deceased fortuitously while the deceased was sleeping in the forest. Not only is accused number 1's version indirect conflict with the evidence of an entirely independent witness Sibongile, but it is so riddled with improbabilities that it cannot be accepted.

These criticisms affect all his testimony, not only that relative to count 2 but also that relative to count one. What amounts to a bare denial of his participation in the abduction and assault on Gwebu must

be rejected. I am satisfied beyond any reasonable doubt that he was part of the group which assaulted Gwebu.

Accused number 2 on his own admission was part of the group which effected the arrest of Gwebu and made common cause with the rest of the group in assaulting him.

Accused number 3 was not represented at the trial and he did not cross examine Gwebu in regard to his participation in the assault. The evidence against this accused however, is vague and unpersuasive and there is no evidence that he was part of the common purpose or that he took part in the actual assault on which it would be safe to convict him. Accused number 3 is accordingly found not guilty on this, the only charge that he faces.

Accused number 4 and 5 were identified by both Gwebu and Siyaya as being part of the armed mob, and were themselves seen to be welding sticks. They claim to have arrived at

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on consideration I find to be irrelevant, because accused number 7 is not charged with having made or causing an unlawful arrest which had been made.

This accused to be found guilty on count one would have to be shown to have ordered or authorised the assault specified in the indictment. This one clearly cannot do. There is also no clear evidence that he sanctioned, authorised or ordered the assault which took place at his kraal. Gwebu's evidence connecting this person with the assault alleged in count 1 is far too vague and cannot stand against the accused's denial. This accused testified in an impressively calm and dignified manner which satisfied me that Gwebu was not correct in implicating him in the assault. Even in so far as it took at the chief's kraal, he too is found not guilty on count 1.

Turning to count 2. There is ample evidence that the deceased Simon Siyaya was found on the Sunday morning by a group of people and taken to the chief's kraal. Having seen the abduction of and assault on Gwebu the previous evening he had obviously fled and hidden in the fields to avoid the same fate. The independent eye witnesses Alice Dlamini and Sibongile Gama saw the search party going to look for the deceased and returning with him after he had been found. When the deceased was found by accused number one and by the group, who were looking for him the deceased had suffered no injuries. Yet when he is taken into custody by the police some relatively short time later, he had been so battered that he succumbed from his wounds shortly thereafter. The independent witnesses saw the deceased being supported while he was escorted to chief's house. There is evidence not only found in the independent but from accused number 8 himself that he assaulted the deceased.

There can be no justification for this assault. He was also assaulted by Xaba. There is no evidence that any of

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the others took part in this assault, and although others may have joined in the real possibility exists that those who I have mentioned were the only two persons who assaulted the deceased.

Accused number 8 claims that his assault was controlled and was aimed at the buttocks and thighs of the deceased. Here again the medical evidence contradicts this. The deceased who we know to be a man incapacitated by swollen legs caused by circulation difficulties was severely beaten. This is consistent with the anger borne by accused number 8. This anger may explain but does not justify this assault.

This however is not a case where the Crown has shown a common purpose on the part of those who did not actually strike the deceased. Accused number 8 in giving evidence admitted that he assaulted the deceased but claims that the blows were few and directed to the deceased's thighs and buttocks.

This does not accord with the evidence of the deceased's condition as seen and testified to by the police but more especially the Doctor Tibagambirwa who was attending to him when the deceased died.

A post mortem report was prepared by Dr. Berson who had carried out an autopsy on the deceased's body. Dr. Berson has left Swaziland and the report was accepted and admitted in evidence as provided for by statute. The cause of death of the deceased was found to be "Aneamia: Coronary artery insufficiency and possibly related to history of assault." It was argued that this gave rise together with some of the other findings as to the aneamia in that the cause of death had not been proved and that the deceased may have died from causes other than the assault.

The report was however interpreted by Tibagambirwa and it is clear that although the deceased suffered from an enlarged heart and circulatory problems, these being

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chronic, the immediate cause of death was the severely-battered state in which the deceased was presented to him. The deceased's chronic condition would have accounted for the swollen legs which prevented him from walking easily and his customary use of a crutch. The defence was at pains to suggest that the deceased had recovered and was not a handicapped person at the relevant time.

This does not accord with the clear evidence of the deceased's chronic condition and the evidence of witnesses who knew the deceased and had no motive to minimize the extent of his incapacity. The medical evidence taken as a whole I am satisfied establishes that the deceased died because of the assault.

This also accords with common sense. The deceased was not moribund when he retired on the Saturday evening. On Sunday morning he died after receiving this severe beating at the hands of accused number 8 and Xaba. The inference is inescapable that the accused caused or hastened the death of the deceased.

The beating was inflicted in anger, mercilessly on a helpless man recklessly as to whether death would ensue or not. The only conclusion to which the court can come is that the accused number 8 is guilty of murder. The remaining accused are found not guilty on count two.

S.W. SAPIRE

ACTING CHIEF JUSTICE