IN THE HIGH COURT OF SWAZILAND

CRIMINAL TRIAL NO.88/96

In the matter between:

REX

VS

1. VELEBANTFU TSIKATI

2. MKHONOVU MAMBA

3. MVIMBI TSIKATI

CORAM : MAPHALALA A J

FOR THE CROWN : MR. N. NDUMA

FOR THE DEFENCE : MR. H. MDLULI

RULING IN TERMS OF SECTION 174

(40 OF THE CASE (AS AMENDED)

Accused nos. 1 to 3 are jointly charged with the murder of Mangaliso Siyaya. The accused are alleged to have been acting in furtherance of a common purpose in committing the murder The accused pleaded not guilty to the charge. A total of 7witnesses was led by the Crown in support of the charge.

At the conclusion of the Crown's case an application was made by Mr. Mdluli representing accused nos. 1 and 3, in terms of Section 174(4) of the CRIMINAL PROCEDURE AND EVIDENCE ACT NO.67 OF 1938 (as amended), for the discharge of

accused no.l and 3 on the grounds that the Crown had failed to establish a prima facie case to place the accused on their defence. Mr. Nduma, for the Crown, opposed the application on behalf of accused no.l and no. 3. He conceded that a prima facie case had not been made out in respect of accused no.2. Accused no.2 was immediately found not guilty and acquitted and discharged. This ruling, relates to the applications by the remaining accused.

Mr. Mdluli submitted, that from the evidence that has been adduced before Court no witness came to Court and said accused no.l or accused. 3 did assault the deceased and as a result of the assault the deceased died. PW1 did not help the Court in anyway. He merely found the deceased already dead.

PW4 Sihlongonyane who was introduced as an accomplice witness could not help the Court either.

He only said he saw the body of the deceased and he did not witness the actual assault on the person of the deceased. PW5 Mfanumpela Mamba who was also introduced as accomplice witness was a hopeless witness according to Mr. Mdluli. He said he did not see neither accused no. 1 nor no.3 assault the deceased.

On the other hand, Mr. Nduma for the Crown contends that the Crown has proved a "prima facie" case to put the accused to their defence. He submitted, that it has been proved by the Crown that the deceased died as a result of multiple injuries. He submitted that the deceased was first assaulted by a group of seven men who apprehended him and that his group included accused no. 1 and no.3.

These people were summoned by accused no. 1 who raised an alarm. Did he want the deceased to be arrested, asks the Crown. According to the Crown the answer would be in the negative because the deceased was already in accused no.1's house locked inside. Accused no. 1 opened the door using his stick and let the deceased loose on a group of men who had answered his call for alarm.

These men were baying for deceased blood as deceased was wanted

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for having killed another person the previous day. Mr. Nduma, submitted that these men took the law into their own hands. It was clear that the deceased died in the hands of the two accused persons and others who are not before Court. The accused should have foreseen the consequences of their actions.

The evidence before Court is that accused no. 1 raised an alarm at his homestead in the traditional way. As a result of which six members of the community came to his homestead. These included accused no.3, PW5, PW6 and three others. These were all men. They were carrying an assortment of weapons, viz knobsticks, baton and the like. The deceased at that stage was inside one of accused no.1's huts locked inside. This band of seven men surrounded the hut, whereupon accused no.1 opened the door using his baton. When the door opened the deceased came out and ran away. The men then chased the deceased for a distance of about 500 metres (a distance from Court B to the Market Place according to one witness). They finally caught up with him. He was then assaulted by these men and he fell down. Accused no. 1 and no.3 according to the evidence before Court were in the group that assaulted the deceased. However, no witness actually saw them delivering blows on the deceased. It was revealed in evidence that the reason the deceased was being chased like this was because he had killed another person the previous day. After the initial assault by the band of seven these men drew back from the deceased, whereupon a mob of other members of the community descended on the deceased and he was assaulted with all manner of weapons until he died.

These are the issues before the Court. The Court has listened very carefully to the submissions by both counsel and considered the evidence adduced by the Crown.

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Section 174(4) in terms of which the present application has been made reads as follows:

"If at the close of the case for the prosecution the Court considers that there is no evidence that the accused committed the offence charged or any other offence of which he might be convicted thereon, it may acquit and discharge him."

This Section is similar in effect to Section 174(4) of the SOUTH AFRICAN CRIMINAL PROCEDURE ACT NO.51 OF 1972. The test to be applied it has been stated as whether, there is evidence on which a reasonable man acting carefully might convict (See R VS SIKHUMBA 1955(3) S.A. 125; R VS AUGUSTUS 1958(1) S.A. 75, not should convict (See GASCOYNE VS PAUL AND HUNTER 1917 T. P. D. 170; R VS STEIN 1925AD 6).

Prima facie it appears to me, that this is a clear case of people taking the law into their own hands.

Why did accused no.1 open the door where the deceased was already locked in, if his intention was to apprehend the deceased. The deceased was already confined. Accused no. 1 had to use his baton to open the door for the deceased to come out. Accused no. 1 together with others including accused no.3 had already surrounded the hut where the deceased was and they were carrying weapons. Why release the deceased to a group of men who were already incensed with him for having killed another person the previous day? Surely, at this stage it would be premature for the Court to discharge the accused in terms of the Section. The deceased died as a result of the assaults inflicted on him by the band of seven who initially chased him for about 500 metres and the mob which descended on him later on, when it became a free for all.

At this stage I rule that the accused has a case to answer in terms of Section 174(4) of the CRIMINAL PROCEDURE AND EVIDENCE ACT (as amended).

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JUDGMENT

After hearing evidence for the Crown accused no.2 was discharged in terms of Section 174(4) of the CRIMINAL PROCEDURE AND EVIDENCE ACT (as amended). The Crown having failed to prove a prima facie case against her. The Court held that accused no. 1 and no.3 had a case to answer.

The accused persons before Court are charged with the offence of murder. The Crown alleges that on or about the 1lth March 1996 at or near Mphahle area, the accused each or all of them, acting with a common purpose did unlawfully and intentionally kill Mangaliso Siyaya.

The accused persons pleaded not guilty and are represented by counsel.

At the commencement of the Crown case admissions by the defence as to the identity of the deceased and that he was the person named as the deceased in the indictment were recorded. The cause of death of the deceased was admitted to be that stated in the report of the post-mortem examination carried out on the body of the deceased. By consent, the report was admitted. The cause of death of the deceased person is stated to be "head injury."

The Crown proceeded to call its witnesses to prove its case. The accused also gave evidence in their defence under oath.

The Court is aware that no onus rests on an accused person to prove his or her innocence but the onus probandi in criminal matters rests on the Crown to prove its case beyond any reasonable doubt.

In the event that an application in terms of Section 174(4) is refused, as it is the case in

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the instant case then the next stage is another standard to be applied, that is whether the Crown at the close of the defence case has proved the case beyond any reasonable doubt.

The evidence of the Crown is that accused no. 1 raised an alarm at his homestead and as a result of which six members of the community came to his homestead in answer to the call. These included accused no. 1, PW5, PW6 and three others. These were all men. They were carrying an assortment of weapons, viz, sticks, sjamboks, knob kerries and batons. The deceased at the stage was inside one of accused no.1's huts locked inside. The band of seven men then surrounded the hut, whereupon accused no. 1 opened the door using his baton. When the door was opened the deceased

came out and ran away. The men then gave chase. They chased the deceased for a distance of about 500 metres. They finally caught up with him. He was then assaulted by these men, as and as a result of the assault he fell down. Accused no. 1 and no. 3 according to the evidence before Court were in the group that assaulted the deceased. However, no witness actually saw them delivering blows on the deceased. It was revealed in evidence that the reason the deceased was being chased like this was because of the allegation that he had killed a member of the community the previous day. After the initial assault on the deceased the seven men retreated from him, whereupon a mob of other members of the community descended on the deceased. He was then assaulted with all manner of weapons until he died.

The key witness for the Crown is an accomplice witness PW5 Mfanumpela Mamba who deposed as to the participation of accused no. 1 and no.3 in the initial chase but he stated under cross-examination by the defence that he did not see neither accused delivering blows on the deceased. The other witnesses for the Crown did not help the Court in any way as they came to the scene after the event.

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The two accused persons gave evidence under oath. Accused no. 1 told the Court that it was not true what PW5 told the Court that he was the one who raised an alarm as he was at the dipping tank when the incident took place. He stated that when he came to the scene he found that the deceased was already dead. Members of the community forced him to admit that he was the one who raised an alarm. Fearing their wrath he succumbed to this plan.

Accused no.3 told the Court that one Mzelwa Mamba came and found him sitting with some of his friends. He informed them that the fugitive (deceased) had been located. The boys then went out of the hut they were in taking their weapons with them. They chased the deceased until he was caught and assaulted. The deceased fell down. They left him sitting down and instructed PW5 (Mfanumpela Mamba) to go and call the Chief Runner and inform him that they have caught the culprit. He told the Court that PW5 instead of following their instructions he went around telling members of the community who came in their numbers. These people assaulted deceased until he died. The accused further told the Court that one Nathi Mamba came and hit the deceased twice on both sides of the head and as a result of this the deceased died

In submissions I was urged by the Crown to treat this matter as one of common purpose and find the accused guilty of what was done by their fellow participants in the commission of the offence After all it was submitted the deceased is dead and two of the people in the group which killed him have been identified.

It was submitted on behalf of the Crown that the two accused had mens rea in the form of dolus eventualis that is not direct, but constructive intention to kill. The prosecutor relied on the following passage in the case of VINCENT SIPHO MAZIBUKO VS R 1982-1986 S. L. R

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372(CA) at page 380C:

"A person intends to kill if he deliberately does an act which in fact he appreciates might result in the death of another and he acts recklessly as to whether such death results or not."

The Crown argued that the accused should have foreseen that other members of the community would join the fray and thus, assault the deceased to death. Mr Nduma for the Crown submitted that the deceased was already confined in accused no.1's hut if their intention was to arrest the deceased

they intended to kill the deceased by letting him loose in a group of people who were baying for his blood for his past deeds.

The defence argued that the Crown has not proved its case beyond any reasonable doubt in that there is evidence that one Nathi came to the scene with the big mob and finished the deceased off.

The accused before Court could not be expected to have foreseen the arrival of Nathi Mamba.

These are the issues before me. I have considered the evidence in its totality and also considered the submissions made by both counsel. In viewing the evidence as a whole I am unable to find that the accused persons foresaw that other members of the community would join and ultimately kill the deceased. We have the evidence of the Crown that after the initial assault on the deceased by the group of seven which included the two accused persons they retreated. By that time the deceased was sitting down. If the accused intended to kill the deceased why did they stop at that juncture? One is forced to conclude that they intended to apprehend him. We have the evidence of accused no.3 in which he maintained under cross-examination by the Crown that at that juncture they sent PW5 to go and call the Chief Runner, however, he went around and called other members of the community who then descended on the deceased. I have no reason to

disbelieve the evidence of accused no. 3 on this point. To me the action to call the Chief Runner negates the intention to kill on the part of the group of seven. It indicates that their intention, at least, at that stage was to place the deceased in the hands of the law. The evidence of PW5 and accused no. 3 compliments each other in this respect that the group of seven stopped assaulting the deceased after the deceased was down.

There is strong evidence that one Nathi Mamba came afterwards and he delivered two blows on the deceased on both sides of his head until he died with a knob kerrie. The police officer who gave evidence PW7 stated under oath that Nathi Mamba was heavily implicated in the death of the deceased. He failed to locate Nathi as he is believed to be somewhere in South Africa. PW5 also mentioned in his evidence the existence of Nathi at the scene of crime. Accused no. 3 told the Court under oath that Nathi came and hit deceased on both sides of the head until he died.

It is clear that there was another person, in excess zeal which was not foreseen by the accused persons, inflicted the fatal injuries. The medical report states that the deceased died due to head injuries. There is strong evidence that the said Nathi Mamba delivered the "fatal stroke" on the body of the deceased. Not a single Crown witness saw the accused assaulting the deceased.

In the circumstances of the case, with due respect to the Crown, it would be stretching the foreseeability test too far to hold that the accused should have foreseen such an eventuality - the emergence of Nathi Mamba.

For these reasons I hold that the Crown has not proved its case beyond a reasonable doubt against the two accused persons before Court.

The accused are, therefore, found not guilty and acquitted.

S. B MAPHALALA

ACTING JUDGE