

IN THE HIGH COURT OF SWAZILAND

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CASE NO. 21/98

IN THE MATTER BETWEEN

REX

VS

SIPHO COMPUTER DLAMINI

CORAM S.B. MAPHALALA - A J

FOR CROWN MR L. NGARUA

FOR DEFENCE MR MDLULI

JUDGEMENT

(10/07/98)

The accused person was initially charged with four counts. On the first count he was charged with murder and on counts two and three he was charged with the crime of robbery. On count four he was charged with contravening section 11(1) of Act 24 of 1964 as read with section 11 (8) of Act 24 of 1964 (as amended) and on the alternative to count four he was charged with contravening section 11 (3) of Act 24 of 1964 as read with section 11 (3) of Act 24 of 1964 (as amended). The accused pleaded not guilty to all the offences preferred against him. At the commencement of trial Mr Ngarua conceded that count three was the same as count two and he applied that the court cancel it as it was clearly included there in error. Mr Mdluli did not have any objection and the court granted the application and count three was cancelled for purposes of this trial. Further the crown conceded that count four and the alternative were badly drafted and thus should not be considered. These were also cancelled for purposes of this trial. The accused was in the final analysis left with count one that of murder and count two that of robbery.

On the first count the crown alleges in the indictment that the accused is guilty of murder. In that on or about 24th August, 1997 at or near Singengeni area in the District of Shiselweni, the accused person did unlawfully and intentionally kill Bantana Shabangu and thereby did commit the crime of murder.

On the second count the crown alleges that in that or about the 28th August, 1997 and at or near Singengeni area of Shiselweni Region the accused person did unlawfully and intentionally use force and threats of violence to induce submission by Phephile Shabangu, did take and steal from her the sum of E50-00 in cash and did rob her of the same.

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The crown called four witnesses to prove its case. The post-mortem report conducted on the deceased was entered by consent as exhibit "A ". The report states the cause of death to be due to "crania - cerebral injury consequent to rifle fire-arm"

The crown then called PW1 Phephile Shabangu who told the court that the deceased and the accused

are well known to her. On the 24th August, 1997 at about midnight she was sleeping in her house. She was with Khanyisile Shabangu, Nomfundo Shabangu and Mhingisi Shabangu. The deceased was in another hut in the same yard. As they were sleeping at around 11.40pm they heard a door being forcibly opened. The door was eventually opened and Siphso Dlamini the accused entered the sleeping hut. She said it was the accused who killed the deceased. She knew the accused very well as they have been neighbours for a long time. He was wearing a balaclava and it had a torch attached to it. He was also carrying a gun. She did not know what kind of a gun it was. She then raised an alarm. The accused ordered them to keep quite, but they proceeded to raise an alarm. He then went out kicking the door behind him. Once he was outside he then fired a shot at the window. He then inserted his hand through the window and opened the door. Nomfundo and Khanyisile ran away. PW1 also attempted to run away but she remembered that she had a small child. She took the child but the accused tripped her and she fell on top of the child. Whilst she was down she continued with raising an alarm. The accused ordered her not to make further noise and accused throttled her. Accused ordered her to give him money. He said he was not going to shoot her if she gave him the money. The accused then ordered her to go and open her brother's hut (deceased). They then went to her hut to get the money. She attempted to light a lamp but accused ordered her to put it out. Accused then put on his light of the torch which was attached to his balaclava he was wearing. PW1 then gave the accused a sum of E50-00 which he took away from her. He then ordered her to take him to the deceased hut. When they had just came out of the door the deceased also came out of his sleeping hut after having heard the disturbances in the night. When the deceased came out the accused shot him and the deceased fell down and died. She then put down the child and ran away after her brother had fallen down. When she was a distance away the accused shot at her brother again. There was a neighbour in the vicinity who happened to be a police officer who also fired a shot. The accused then ran away and there were two others who were with the accused they also ran away. She then went to where the deceased lay to try to revive him but he had already died and blood was coming from his mouth, the deceased was conveyed to hospital where he was certified dead on arrival. She told the court that the deceased was on vacation as he worked at the mines in South Africa. She further deposed that she could recognise the accused persons by the clothes he wore. He had a unique way of putting a short trouser on top of a long trouser and was known in the area for this eccentricity. She also told the court that she could recognise the accused by his voice when he ordered her to keep quite.

This witness was cross-examined briefly where in my view she was not wavered at all and kept to her evidence-in-chief in view of pointed questions by Mr Mdluli.

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The crown then called its second witness PW2 Khanyisile Ntombi Shabangu whose evidence corroborates that of PW1 in all material respects. She described the sequence of events leading to the death of the deceased in similar language to that was used by PW1. She also told the court that she recognise the intruder as the accused person by the peculiar way he dresses. She was also cross-examined briefly where she stuck to her evidence-in-chief and she stated that it was the accused who attacked them that night.

The crown then called its third witness PW3 2032 Sergeant Mahlalela who is the investigating officer in this case. He told the court that after the matter was reported to him he commenced with his investigations. His investigation led him to the accused person who he arrested on the 24th August, 1997 at 6.30am at his homestead at Singengeni. He said he introduced himself as a police officer stationed at Hlathikhulu Police Station and was investigating a murder of the deceased. He thereafter cautioned the accused in terms of the Judges Rules. As a result of the caution the accused handed to him the following items:

1. A pipe
2. Four clamps

3. One door hinge
4. A plank which was shaped like a butt of a gun
5. A nail
6. A yellow torch
7. A navy blue balaclava

These items were entered collectively as exhibit 1. He told the court that he asked the accused to demonstrate how this assortment of items work as they appeared to be a "gun". The accused demonstrated how this contraption worked but stated that he was still working on it. The force armourer was present but did not test the contraption as to its serviceability. The witness also told the court that when he arrested the accused he was wearing a white trouser which was short on top of a long black pair of trousers. He was also wearing army boots which were brown in colour. It must be noted that PW1 and PW2 also mentioned that the accused was wearing long boots when he broke into their sleeping hut.

The witness also was given a pellet by the doctor who conducted the post-mortem report. The said pellet was extracted from the body of the deceased. This witness was also cross-examined where it was suggested to him that the accused never displayed to him how the contraption worked. However, maintained that the accused did.

The crown then called its last witness PW4 Irene Mbingo who is accused's mother. She produced accused health card which showed that accused was born on the 18th June, 1976 and was now 22 years old.

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The crown then closed its case whereupon Mr Mdluli applied for the discharge of the accused in terms of section 174 (4) of the Criminal Procedure and Evidence Act (as amended). That the crown has not made a prima facie case to put the accused person to his defence. However, after hearing arguments for and against the application the court ruled that a prima facie case has been made to put the accused on his defence.

On the 3rd June, 1998 the accused took the witness stand where he gave a lengthy account on his version of things. The long and short of his story is that he was at home sleeping when the act was committed. He in other words put forward the defence of alibi. He was arrested by Mahlalela for no apparent reason and charged with this offence. He said at the police station he was tortured by Mahlalela with a tube and ordered to admit killing the deceased. I must say at this juncture that this came as a complete surprise the accused was giving evidence-in-chief it was not suggested to PW3 Sergeant Mahlalela in cross-examination by Mr Mdluli for the defence. It is trite law that the defence is to put as much of its case by way of cross-examination for it to have a certain degree of credence. Hannah CJ in the case of the King vs Dominic Mngomezulu and others Criminal Case no. 96/94 (unreported) at page 17 had this to say on the point:

"It is, I think, clear from the foregoing that failure by counsel to cross-examine on important aspects of the prosecution witnesses testimony may place the defence at risk of adverse aspects being made and adverse inferences being drawn if he does not challenged a particular item of evidence then an adverse inference may be made at the time of cross-examination his instructions were that the unchallenged item was not disputed by the accused, if the accused subsequently goes to the witness box and denies the evidence in question the court may infer that he was changed his story in the intervening period of time. It is also important that counsel should put the defence case accurately. If he does not and accused

subsequently gives evidence at variance with what was put, the court may again infer that there has been a change in the accused's story".

The story that the accused was tortured by a tube was never put to Sergeant Mahlalela.

The accused person was cross-examined at length by the crown where he gave a bad impression to the court.

The accused then called PW2 Getrude Mamba his sister who told the court that on the night in question the accused came home from work and they had supper as a family and all went to sleep. They slept in the same house with the accused but accused slept in a separate room and had to pass their room to go out of the house. The witness was cross-examined at length by the crown

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where she conceded that it was possible that the accused might have gone out of the house after they had gone to sleep as they were tired that night after cutting grass the whole day and they slept soundly.

The court then entertained submissions from both sides which I have considered and I have considered the evidence in its totality. It is my considered view that the accused person is guilty of both the offences. I will start with the evidence of PW1 who is the victim of the robbery where a sum of E50-00 was taken from her. She described to court that there were threats of violence made by the accused. There was an extended struggle between her and the accused. She could recognise that the accused was wearing a balaclava with a torch attached to it. The accused had broken into the room where they were sleeping with two other girls. The other girls ran away but she remained because she had a small baby. The accused throttled her and ordered her not to reveal his identity. In my view this witness was candid to the court and answered questions in a clear manner. She conceded that she could not see the accused's face because of the balaclava. But she was able to identify him by his voice and also by the way the accused was dressed at the time. It was after accused had taken the E50-00 that he asked her to go and knock at her brother's hut. That is when the brother opened the door and threw a stone at the accused. At that moment a shot was fired. According to her the shot was fired by the accused as there was no one else in the vicinity.

Her versions of events was corroborated in all material respects by PW2 Khanyisile Shabangu who said there was an attack at her homestead and she saw a man dressed in the same manner the accused normally dresses. She said immediately she saw the person she knew that it was the accused. She ran out and saw two figures lurking in the shadows. She then heard a gun shot. There is no issue who was killed that night it was the deceased.

PW3 Sergeant Mahlalela told the court that upon receiving certain information he went to the homestead of the accused and after cautioning the accused in terms of the Judges Rules accused produced the items exhibit 1. He also produced a navy balaclava. The accused when he was arrested did not say anything in his favour. He did not state an alibi after he had been told that he was charged with murder. The accused does not deny the contraption and the balaclava. Why should the accused act against his own interest when he had been charged with such a serious offence.

Looking at the circumstances of the case it emerged that there was no bad blood between the accused and PW1, PW2, PW3. Accused was not assaulted by the police to point out these items. The allegation that he was tortured by a tube is pure fiction.

What is also of more interest is that it was during the trial when the accused brought the defence of alibi that he was at home sleeping. The court is alive to the principle that no onus lies on the accused to prove an alibi (see RV Biya 1952 (4) S.A. 514 (A)). The Appellate Division said that

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the accused never bore the onus of proving his alibi. It is sufficient it might reasonably be true. This does not mean that the court must consider the probability of the alibi in isolation, if someone says that he was in bed at midnight and no other evidence may be considered, it would be difficult to say that could not reasonably be true, but if there is sufficient strong evidence to show that in fact breaking into a shop, the court may consider that his story can be safely be rejected (see Rex vs Hlongwane 1959(3) SLA. 337 at 340 - 41).

In the present case accused's alibi has a lacuna. He could have left the house anytime without PW1 his sister noticing. Her sister under cross-examination told the court that it was possible accused might have gone out after the whole family had gone to sleep. She could not vouch for the accused after 8.00pm when they went to bed. What we have here as Mr Ngarua puts it is a crack in the shield of accused's alibi. Here we have the evidence of PW1 and PW2 who know the accused very well and it is not disputed that they grew up together with the accused in close proximity. PW1 told the court and the court has no reason to disbelieve this evidence that when the accused spoke she knew that it was the accused. PW1 and PW2 told the court that it was the accused because of the manner the accused dressed. They both mentioned that the intruder had long boots on. PW3 Sergeant Mahlalela accosted the accused and found him wearing the same kind of clothes as described by PW1 and PW2 plus the army boots. This evidence is too coincidental. PW1 told the court when accused throttled her he ordered her not to divulge his identity. The accused was found with the contraption, the torch and the balaclava which were described by PW1 and PW2.

The totality of the evidence places the accused person at the scene of the crime. The evidence of PW1 an eye witness link the accused with the death of the deceased. She said she saw the accused shooting the deceased. It is not in dispute that the deceased died as a result of gunshot wound. PW2 also heard a gunshot when she ran away from the accused.

In the result, I find as a matter of law and fact that the accused committed the two offences preferred against him that of murder and robbery.

S.B. MAPHALALA

ACTING JUDGE