

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABAIME

CRIM. T. NO. 29/95

In the matter between:

REX

VS

SIDUMO SIMELANE

ALBERT MHLANGA

MAJOZI MAZIYA

JUDGMENT

31/10/95

The three accused are charged in count 1 with murder of Lezzy Thabede on 26 February, 1992 at Lonhlopheko area in the Lubombo Region and count 2 with the attempted murder of Mciniseli Lukhele on the same date in the same area.

The post-mortem report and the medical report were admitted by consent and marked exhibits A and B. The post mortem report states the cause of death as multiple injuries. The left eye was destroyed. The report lists nine other injuries which suggest that more than one bullet was fired on the deceased's body.

The medical report on Mciniseli state that he was admitted to hospital on 27th February 1992 for a gun shot wound on the right shoulder entrance ventral exit posterior. The x-ray revealed a destruction of the head of the right humerus. The report was compiled after a period of two months that is on 22nd April, 1992.

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The Crown called Mapipi Dlamini who stated that on 22nd February, 1992 he heard an alarm at his home. He went to the gate. He found accused no. 2. He informed him that there was a vehicle at the road which passed carrying cattle. He then took his car and went to the market where he found a lot of people. They then saw a car near the railway pass Mpaka railway station. They went to the car. Some people ran away. One person remained, he told them that he was fixing a tyre. The other people ran into the forest. They then took him to the market in the witness's car. They then saw another car light at the same spot. He was with no. 1, 2 and his brother Fakazi. They found the deceased's car. It was opposite the car they found at first. The deceased was crossing to this car. The other people in deceased's car ran away. They asked the deceased what he was doing there but he did not hear what the deceased said as there was noise there. The deceased was put in the boot of his car. His brother Fakazi drove deceased's car to the market.

In cross-examination he said he could not deny that the deceased was from the forest when they arrived at his car. At the market it was then decided that the suspects must be taken to the police. The Shangaan and the deceased were in the boot. There were many people at the market. He did not see if they were armed because it was dark. On their way to Siteki no. 1 ordered him to turn back. No. 1 and 2 were in his car. The people who were in his boot could communicate with the people in the car. They pushed the chairs. He was afraid that he would be involved in the accident. They went back to the market where the Shangaan and the deceased were off-loaded. He maintained that no. 1 was sitting next to him in his car.

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It must be observed here that this witness maintained that no. 1 and no. 2 were in his car. He does not say anything about the people who were in the deceased's car nor does he mention Mciniseli Lukhele. After off-loading the people at the market, he drove home with his brother. He then heard a gunshot or gun shots while going home. He did not witness any shooting.

The next witness was Solomon Dlamini who stated that the deceased and Mciniseli Lukhele were cattle thieves. The people of Mpaka complained about them. On the 26th February, 1992 he went to the market. He found two cars, a blue Sedan and a white van. They were told to drive the cattle which were in the forest back home. The cattle belonged to no. 1. He did not see the deceased that day. He did not see the deceased being shot. He heard in the morning that the deceased was dead.

Jabulane Shongwe stated that in 1992 he went to the market. He found many people. The people said no. 1's cattle have been found. They then drove no.1's cattle home. He did not see the accused. He then heard shots being fired. He saw no 1. He was not armed. He did not say to the police he saw no. 1 shoot the deceased.

The fourth witness was Mciniseli Lukhele. He stated that on 26th February, 1992 he left for Siteki. The deceased requested Sikhumbuzo Maziya, Matholeni Nkambule and him to accompany him. The deceased was going to deliver maganu to the police officers. One of the police is pw5 in this case. They gave the maganu to the police officers. the police drank but he and his group did not drink. They left for Siteki at about 7 p.m. When they were near Matsetsa he fell asleep.

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When he woke up he felt that he was being assaulted. He then saw no. 1 and no. 2. He asked why he was being assaulted but they did not tell him. They put him in the deceased's car. The deceased was put into the boot of pw1's car. No. 1 no. 2 and he were sitting in front of the deceased's car. This was at railway line near Matsetsa. There was another car at that spot. They then drove towards Siteki. No. 1 then said they must drive back because the police would arrest them yet they wanted to kill them. They did not say why they wanted to kill them. The van turned back and the Sedan followed. There were people at the back of the van. No. 1 was driving the van. He was sitting between no. 1 and 2. He then asked no. 2 why he was being assaulted. He did not carry a gun. He was driving. No. 1 said he knew why he was being assaulted. He said he did not know no. 3. He did not know pw2, Fakazi Dlamini. The Sedan then overtook the van.

They hooted until they reached Vukuzenzele Store. They found many people. No. 2 shouted and said Lezzy, the deceased had been found. He said he must get out of the car and he put a barrel of the gun on his neck. He then tried to run away. He was shot on the shoulder. He fell down. Mhlanga, no. 2 said they must guard him because he was not dead. He was shot when he was running away. He did not see who shot him. He tried to get up but the person who guarded him hit him on the leg and the knee. He saw the person who guarded him. He was pw2 Solomon Dlamini. Pw2 raised an alarm. He then ran into the trees and out ran pw2 and the crowd. When they were injured, he was with Sikhumbuzo Maziya and Matholeni. Sikhumbuzo Maziya was seriously injured.

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They were in hospital together. No. 1 did nothing to him in the car. No. 2 was armed with a gun. He did

not see what happened to the deceased.

In cross-examination, he said they had gone to Siteki to deliver maganu to Mzileni and Charles Zwane the investigating officer pw5. He did not drink the Maganu at Siteki. He then repeated his evidence in chief that he fell asleep on their way back. When he woke up the deceased was not driving. He was then asked if he made a statement to the police. He agreed. He said he did not make a sworn statement. He said he told the police that the car was driven by no. 1 when he woke up. He then changed and said no. 1 drove the car after he woke up and assaulted him. He repeated that he did not see the person who shot him. He suggested that he was shot by no. 2 because he carried a gun and shouted that he must be guarded because he was not dead. He then said he was telling the truth that he was shot by no. 2. He said he could not estimate the number of people because it was dark. He further said he did not have any grudges against no. 2. They never quarrelled. He was surprised why he assaulted him. He said he was definite that he sat between no. 1 and 2 in the van. He denied that the deceased's car was driven by Fakazi Dlamini. He denied that no. 1 was in pw1's car. He said no. 1 flicked his lights for pw1's car to stop. They then turned back to the market. He maintained in cross-examination that he was telling the truth. What must be observed in the evidence of this witness is that it is the direct opposite of what pw1 and other witnesses said.

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The Crown then called the investigating officer Charles Zwane who stated that between 11 and 12 midnight he was informed that a car was burning at Malindza. He went to Malindza and found a white van burning. He also found the body of the deceased. He had met the deceased the previous day. The deceased was with Mciniseli Lukhele, Sikhumbuzo Maziya and Matholeni Nkambule. They had brought maganu to him. He traced Lukhele to R.F.M. hospital. He then went to no. 1's kraal. No. 1 led him to the kraal of Siphandla Dlamini. Siphandla Dlamini gave him a shot gun exhibit 2. At the scene he found an empty cartridge, a shot gun. This is exhibit 1. He then went to the homestead of no. 2. He did not find no. 2. As a result of an information he got from Mciniseli Lukhele, he told accused no. 2 to bring the gun, exhibit 3 to the police. The two guns and the cartridge were sent to Pretoria for expert examination. He examined the deceased's body He found that it had a wound on the eye and a number of wounds on his body.

In cross-examination, he said the deceased who had brought maganu was out on bail pending an appeal on a conviction for stock-theft committed in the same area. He said they brought maganu to them but not meat. The deceased and his friends drank the maganu but they were already drunk. He said the cattle the deceased was convicted for belonged to Zakewu Magagula. He was on bail for E5000. Members of the community recovered their cattle stolen by the stock. thieves from Mnyokane.

The ballistic report was handed in in terms of section 220 (4) of Criminal Procedure and Evidence Act. It was established that exhibit 1 found at the scene was fired from exhibit 2, the shotgun recovered from Siphandla Dlamini.

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The Crown then closed its case.

I then acquitted no. 3 because he was not mentioned by any of the Crown witnesses. The defence applied for the discharge of accused no. 1 and 2. To save time, I refused the application because Section 174 (4) had been amended.

The defence then closed its case.

The Crown then addressed the court. The Crown argued that the community went to arrest the thieves

not to kill them. It argued that they had common purpose to kill the deceased. Except that the accused pointed the two shotguns, there is no other evidence which shows who killed the deceased. The Crown tried to rely on the evidence of Mapipi Dlamini and Mciniseli Lukhele. I asked the Crown to address me on the evidence of the two witnesses and any evidence it thinks it had led which can convince me that a reasonable Judge can convict on the strength that the accused did not give evidence. The Crown failed because the evidence of Mapipi and Lukhele talk of different incidents yet they were in the two cars the same night. At the market there is no eye witness to the shooting. Mapipi heard shots being fired while he was going to sleep. Lukhele was shot while he was running away. As a suspected cattle thief, he was escaping from arrest. The owners of the cattle were entitled to shoot him when he tried to escape. Mciniseli also said the person who guarded him after he was shot and fell was Solomon Dlamini he saw him. Solomon Dlamini gave evidence that the deceased and Mciniseli were stock thieves. The community was not happy about them. On the 26th February 1992, he went to the market and found many people.

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He also found two cars, a blue Sedan and a white van.

He was told to drive the cattle of no. 1 to his home. He does not support the evidence of Lukhele.

The defence addressed the court and stated that the Crown witnesses were not reliable. I agree with the defence that it would be wrong to rely on the evidence of Lukhele and Mapipi. He also referred the court to the case of MHLONGO AND OTHERS that the pointing of the guns was not freely and voluntarily. The Crown did not lay a base for its admissibility.

I have outlined the evidence and it is clear that there is no evidence on which the court can convict. I accordingly acquit the accused.

I make one observation that the deceased put himself in danger by applying for bail. I do not mean that I support mob justice. The way Swazis value cattle, they can do anything to defend them. The deceased and his group was mixing freely with the police. This incident happened when the group was from delivering maganu to the police who are supposed to investigate the stock theft in the area. When this incident took place, the group had started rounding up the cattle in the area. That is why the people woke up at night and gathered at the market.

A.F.M. THWALA

JUDGE