

IN THE HIGH COURT OF SWAZILAND

CRIM. CASE 34/1997

In the matter between

THE KING

VS

1. PAULOS RINESTO JAMBALI

2. PAUL MFANA NDZIMADZE

CORAM : DUNN J.

FOR THE CROWN : M. NSIBANDZE

FOR ACCUSED NO.1 : J. MAGAGULA

FOR ACCUSED NO.2 : B. SIMELANE

JUDGMENT

8TH JULY 1997

The two accused are jointly charged with the crime of murder, In the following terms-

In that on or about the 31st October 1996 and at or near Maphungwane area in the Lubombo Region, the said accused each or both of them, acting with a common purpose did unlawfully and maliciously kill Obed Ndlanzi.

The accused pleaded not guilty to the charge.

It is not in dispute that the body of the deceased was found lying In a stream next to a vegetable plot on the 1<sup>st</sup>

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November 1996. It is further not in dispute, that the deceased died as a result of multiple injuries involving a depressed fracture of the skull and a penetrating wound of the right side of the neck, severing the carotid artery. The injuries are set out in detail, in the report of the post-mortem examination (exhibit A) carried out by the Police Pathologist, Dr Reddy and which was handed in by consent as part of the evidence.

The crown's case rests largely on the evidence of an accomplice witness Themba Mbhamali. The two accused are known to Mbhamali. It was Mbhamali's evidence that the two accused arrived at his homestead on Wednesday 30th October 1996. They informed him of the fact that the deceased's wife had laid a charge of theft of a chicken against accused no.1 with the Siteki Police. Accused no. 1 expressed his anger at this having been done as it was not the first time that the deceased's wife had done so. The two accused suggested that the deceased's wife should be killed for this. It was later suggested that the deceased should also be killed. According to Mbhamali, he was asked if he was brave enough to join in the murder. It was his evidence that he responded in the negative. Accused

No.1 then enquired if he (Mbhamali) would not be brave enough merely to hold and not be involved in the actual killing. Mbhamali told the court that his response to this question was that he would see.

The accused and Mbhamali then left Mbhamali's homestead and proceeded to accused No.2's parents' vegetable garden to pick cabbage leaves which Mbhamali had requested to feed his pigs.

The garden is one of three adjoining

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gardens, the second and third being owned by the deceased's family and accused no.1's employer respectively.

On arrival at the garden, Mbhamali stated that they saw the deceased working in his garden. They picked some sugar cane which they ate whilst sitting on some poles next to accused no.2's parents' garden. There were two women picking spinach across the stream from where the accused and Mbhamali were. It appears from Mbhamali's evidence that had it not been for the presence of the two women, the deceased would have been attacked on that day. According to Mbhamali accused no. 1 then stated that he had to go and round up cattle and that what they should have done that day, would have to be done on some other occasion. Accused no.1 then left the garden. Accused no.2 picked the cabbage leaves and he and Mbhamali left for their respective homes.

According to Mbhamali the two accused again visited him on the following day. They asked him to join them. When he asked where they were going to, he was informed that they would discuss the matter along the way. Mbhamali was carrying what was described as a cane cutter. It was his evidence that along the way the accused asked him if he would be able to do the job which they wanted to be done.

Mbhamali told the court that he again responded that he was not brave enough. They proceeded until they got to accused no.1's homestead. Accused no.1 went into one of the houses and returned carrying a knife. The three then proceeded to the garden. The deceased was working in his garden.

After a while the two accused went to the deceased. Accused no.2

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had taken possession of the cane cutter from Mbhamali. According to Mbhamali accused no.2 assisted the deceased in picking beans. Mbhamali then stated that he went up to where the accused were with the deceased and took possession of his cane cutter. He walked away from the accused and the deceased. As he walked away, he saw accused no. 2 grabbing hold of the deceased. He could not see what happened after that because his view became obscured by banana trees at the edge of the garden. Shortly after that, he states that he saw accused no.2 approaching from the direction of the stream. Accused no.2's hands were wet and it appeared that he had just washed them. Accused no.2 asked Mbhamali why he had runaway with the can cutter. According to Mbhamali accused no.1 then appeared. Accused no.1 was carrying the knife he had taken from his home. The knife and accused no.1's hands were wet. Accused no.1 also questioned Mbhamali as to what had happened to him as they had thought he would assist them.

According to Mbhamali accused no.2 proceeded to describe how he had grabbed hold of the deceased and as to how accused no.1 had struck the deceased on the head with a stone before cutting his throat with a knife. Accused no.1 asked Mbhamali if he would not cause them to be arrested because of his failure to assist them. Both the accused expressed their concern and fears that Mbhamali might cause them to be arrested. It was Mbhamali's evidence that accused no.2 suggested that Mbhamali be given some money in order to leave Maphungwane area. Mbhamali told the court that he assured the two accused that he would not divulge what had

happened.

Mbhamali was arrested by the police on the 2nd November. He told the court that he at first denied all knowledge concerning the deceased's death and that he later told the police of what happened on the 31st October.

The cross-examination of Mbhamali by counsel for the two accused was brief. In so far as the cross-examination on behalf of accused no.1 was concerned, it was put to Mbhamali that accused no.1 would deny that he carried a knife. It was further put to him that accused no.1 would deny having been arrested in connection with the theft of a chicken. None of the evidence given by Mbhamali as to what was said by accused no. 1 when he met with Mbhamali and accused no.2 was challenged on behalf of accused no.1.

In so far as accused no.2 is concerned, it was put to Mbhamali that accused no.2 would deny having said that he had grabbed hold of the deceased. It was also put to him that accused no.2 would deny that he washed his hands in the stream on the 31st October. It was further put to Mbhamali that he was never recruited by accused no.2 to kill either the deceased or his wife.

The witness Jabulane Vilane who is a cousin of accused no.2 told the court that he was approached by accused no.2 at his work place at Matsapha on the 1st November 1996. Accused no.2 informed him that he had a problem. Accused no.2 stated that he and two other persons, one of whom was a

Mozambican had killed the deceased. Vilane gave evidence of the details of how the murder was committed which were given to him by accused no.2. Vilane did not know the Mozambican which accused no.2 was referring to. He did, however, know the deceased. According to Vilane accused no.2 mentioned the fact that they assisted the deceased in picking beans, that he (accused no.2) had gotten hold of the deceased, that the deceased was struck on the head with a stone by one of the companions and that the same companion cut the deceased's throat. It was Vilane's evidence that accused no.2 told the same story to his sister at Matsapha that day.

According to Vilane accused no.2 had an okapi knife in his possession when he narrated what had happened. Accused no.2 stated that he wanted to throw the knife away. The witness Meshack Nkambule told the court that he overheard accused no.2 talking about throwing a knife away. He asked for the knife and accused no.2 gave it to him. The knife was later handed over to the police and was identified by the accomplice as the knife accused no.1 had taken from his homestead.

Vilane and Nkambule were not challenged in their evidence. All that arose from the cross-examination was that accused no.2 would deny that he had claimed ownership of the knife. The fact that he produced it and that it was eventually given to Nkambule was not put in issue.

The deceased's wife Filomina Maziya gave evidence relating to the charge she laid against accused no.1. Her evidence

was that accused no.1 once lived at her homestead. He left her homestead in September 1995. In October 1996 Mrs Maziya received information that accused no.1 had claimed that he had chickens at her homestead which he was selling. Enquiries which she made subsequent to that led to the

discovery of one of her chickens at the accomplice witness's homestead. It was not disputed that the chicken had been left at the accomplice's homestead by accused no.1. It was for the theft of this chicken that Mrs Maziya laid a charge against accused no.1. It is not in dispute that accused no.1 was convicted for the theft of the chicken. He paid the fine that was imposed on him and returned to Maphungwane in October 1996.

1841 detective sergeant Wilson Vilane told the court of how he was taken by accused no.2 to Jabulane Vilane's homestead at Matsapha and as to how the knife which accused no.2 had given to Nkambule was recovered.

Both the accused gave evidence on oath. They each denied knowledge of the death of the deceased.

They agreed that they had indeed gone to accused no.2's parents' garden on the 30th and 31st October for cabbage leaves, at the request of the accomplice witness. They denied all knowledge of what the accomplice stated they had told him had happened as they left the garden on the 31st October.

I was most impressed by the accomplice witness. He struck me as an honest and reliable witness. He did, however, appear to be trying to minimise the role he played and as to

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precisely what he saw. This is a generally accepted trait of accomplice witnesses. I am nevertheless satisfied, overall, that his evidence of the plan by the accused to murder the deceased and his wife is the truth. The material aspects of his evidence have not been challenged. Mbhamali remained largely unshaken in his evidence.

The evidence of accused no.2's cousin, Vilane, of what he was told by accused no.2 is in line with what the accomplice states he was told by accused no.2. Vilane and the accomplice never met and it would be a strange co-incidence for them to fabricate an almost identical tale against accused no.2.

The identification of the knife which was given to Nkambule, as the knife which accused no.1 took from his homestead on the day of the murder adds much weight to the evidence of the accomplice. If it can be said, on the evidence that the person mentioned by accused no.2 to his cousin was in fact accused no.1, then the confession by accused no.2 would not be admissible against accused no.1.

The position is, however, that this evidence is in line with what the accomplice states he was informed by accused no.2 in the presence of accused no.1. This evidence indicates consistency in accused no.2's story which tends to corroborate what the accomplice states he was told by accused no.2. That is the limited use to which Vilane's evidence of what he was told by accused no.2 regarding accused no.1 can be put.

The caution to be exercised by court in dealing with accomplice evidence is well known. The evidence against the

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accused in this case is overwhelming. The accomplice evidence is credible and satisfactory in all material respects. It is corroborated in the manner I have described. The evidence of the accused has done nothing to raise any doubts whatsoever as to the truth of the crown's evidence. It is without any hesitation that I reject the denials by two accused of knowledge of the deceased's murder as completely false.

I find the two accused guilty of murder as charged.

B. DUNN

JUDGE