

IN THE HIGH COURT OF SWAZILAND

CRIM. CASE NO.95/96

In the matter between

THE KING

VS

MAGUSHANA MKHALIPHI & 6 OTHERS

CORAM: DUNN J.

FOR THE CROWN: MR NGARUA

FOR THE ACCUSED: MR. K. VILAKAZI

JUDGMENT

27TH JANUARY 1998

The 7 accused are charged with Culpable Homicide, in the following terms:

In that upon or about 15th October 1995 at Ngcamphalala area in the District of Lubombo, the said accused did wrongfully and unlawfully kill Mathonsi Zwane.

The accused pleaded not guilty to the charge. At the conclusion of the crown's case the crown conceded that a prima facie case had not been made out against accused numbers. 2; 3; 4; 6 and 7. An application in terms of section 174 (4) of the Criminal Procedure and Evidence Act No.67/38 for the discharge of the afore-mentioned accused was accordingly granted. The present judgment therefore relates to accused numbers 1 and 5.

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The facts of the case are relatively straightforward. The deceased was implicated in the theft of a goat in the Ngcamphalala area. Unsuccessful attempts were made to have him appear before the local Chief's Council (Libandla) to respond to the allegations made against him. Information reaching the Libandla was that the deceased was not prepared to appear before it. Members of the Libandla were incensed by this and decided, on the morning of the 15th October 1995 that the deceased should be located and forced to attend the hearing. A party of about 30 persons armed with knobsticks, shamboks and spears set out in search of the deceased. He was, found at his nephew's homestead and was called by members of the search party. He did not respond. According to the first crown witness, Mswane Zwane, one Bhizeni Garnedze accompanied by George Mamba moved from the search party and stopped the deceased as he walked away from Mswane's homestead. Accused numbers.1 and 5 then moved up to the deceased. Bhizeni struck the deceased with a knobstick. The deceased warded off the blow. Accused number 1 then struck the deceased with a knobstick, from behind. The deceased fell as a result of the blow. The deceased got up and Bhizeni felled him with another blow with his knobstick. Accused number 5 also delivered a blow with a knobstick. The rest of the search party joined in the assault and left the deceased for dead, just outside his nephew's homestead.

The 3rd crown witness Jeremiah Ngcamphalala saw the search party as it approached the homestead of Mswane. He later heard the clashing sound of sticks and he went to Mswane's homestead where he found the deceased lying on the ground.

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Accused number 1 had stuck his spear in the ground next to the deceased and was doing a traditional victory dance around the deceased. Ngcamphalala advised accused number 1 and his companions to stop what they were doing as the deceased was helpless.

Several witnesses, two of whom were listed in the summary of evidence as accomplice witnesses, were not available to give evidence at the trial. From the summary, it appears that these witnesses may have been in a better position to give a clearer picture of what transpired as they were part of the search party.

The two accused gave evidence on oath and called their former co-accused Mfanawephi Ngcamphalala to testify on their behalf.

Accused number 1 told the court that when the search party met with the deceased the deceased enquired as to what they wanted from him as he had previously told a similar party that he was not prepared to appear before the Libandla. The deceased then advanced on accused number 5 with a knobstick and a bushknife. Accused number 1 stated that he intervened and raised his stick in order to block the blow that the deceased was about to deliver to accused number 5. Accused number 1 stated that at that stage the deceased was attacked by the search party and the next thing that he saw was the deceased lying on the ground.

Accused number 5 stated that when the search party found the

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deceased, the deceased enquired as to what he (accused number 5) wanted. The deceased advanced on him, armed with a knobstick and bushknife. Accused number 5 stated that he ran away and that when he looked back he saw the deceased lying on the ground.

Mfanawempi confirmed the evidence given by the two accused.

The crown witnesses Mswane Zwane and Jeremiah Ngcamphalala were most impressive in their evidence. They struck me as honest and reliable witnesses. Mswane knew the two accused well and the possibility of a mistaken identity is completely ruled out. Mswane's account of what transpired shortly before the whole search party set upon the deceased is very clear and unshaken. Accused number 1 was clearly in the leadership of the search party and was one of the first to communicate with the deceased. His evidence of having simply raised his stick to ward off the blow which he states was directed at accused number 5 is in my view completely false. Accused Number 5 was some distance from the deceased. I accept without any hesitation, the evidence of Mswane. Jeremiah's evidence of the dance which he states he found accused number 1 performing around the deceased lends support to Mswane's evidence.

The same applies to the evidence of Mswane relating to the assault on the deceased by accused number 5. Mswane described in clear detail how accused number 5 struck the deceased, on two separate occasions. Jeremiah Ngcamphalala also saw accused number 5 delivering a blow on the deceased.

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I reject as totally false the evidence of accused number 5 that he ran away from the deceased. He clearly

participated in the assault as testified to by the two crown witnesses.

The post-mortem report, which was handed into court by consent as part of the evidence, reflects that the cause of death was multiple injuries including a fracture of the skull, laceration of the brain and intracranial haemorrhage. The injuries observed on the deceased's body, are set out in detail at page 2 of the report.

The charge against the accused is one of Culpable Homicide. There is no evidence that the blows delivered by the two accused resulted in the death of the deceased. The indictment does not contain any averment that the accused were acting in furtherance of a common purpose. The accused are in the circumstances guilty of the individual assaults on the deceased. An appreciable amount of force was necessary to bring this about. I find accused nos 1 and 5 guilty of assault with intent to do grievous bodily harm.

B. DUNN

JUDGE