

IN THE HIGH COURT OF SWAZILAND

CRIM. CASE NO. 72/95

In the matter between:-

THE KING

VS

EIPHAS LINGTON SHONGWE

CORAM: DUNN A.C.J.

FOR THE CROWN: MR P. NGARUA

FOR THE ACCUSED: MR C. NTIWANE

RULING AT THE CLOSE OF THE CROWN'S CASE

15TH NOVEMBER 1995

The accused is charged with the murder of Dumsane Mhlanga on the 31st December 1994. The accused pleaded not guilty to the charge.

The crown led the evidence of five witnesses in support of the charge. At the conclusion of the Crown's evidence Mr Ntiwane applied for the discharge of the accused in terms of section 174(4) of the Criminal Procedure and Evidence Act no. 67/1938. The application was made on the grounds that the crown had failed to lead any evidence

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identifying the accused as the person who shot and killed the deceased. The application is opposed by the crown.

The crown's evidence may be summarised as follows: The deceased and his colleagues Brasilio Mdaka and Adam Tsabedze, who gave evidence as PW2 and PW4 respectively, were returning from a soccer match late in the afternoon of the 31st December 1994. Along the way they met with at least 4 members of the Umbutfo Swaziland Defence Force (USDF) who were travelling in a landrover. The soldiers were travelling in the opposite direction to that of the deceased and his companions. The landrover stopped at the point where the two parties met. One of the soldiers alighted and asked the deceased and his colleagues to identify themselves. They were further asked as to where they were from and as to what time of the day it was. The deceased and his colleagues responded and were then ordered by the soldiers to run to a certain tree which was about 40 metres away and to return to where the soldier was. They complied and as they did so the landrover drove slowly after them, leaving the soldier who had alighted behind. The deceased and his colleagues returned to the soldier and the landrover stopped somewhere between the deceased and his colleagues and the tree to which they had been ordered to run. The soldier on the ground then instructed them to do some physical exercises. The deceased and his colleagues refused to comply with the instruction and started to question the soldier as to what wrong they had done for them to be treated in that manner. At that stage the deceased and his colleagues walked away from the soldier. A second

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soldier who was described as wearing a red top, alighted from the landrover and took a rifle from another soldier on the landrover. He walked towards the first soldier.

The deceased and his colleagues walked for a distance of about 40 - 50 metres and then started running. At that stage a gun was fired. Brasilio and Adam ran in different directions without looking back and met each other on a road some distance from the soldiers. The two witnesses thought that the deceased had run off in another direction and expected to meet him along the way. The deceased did not turn up and the witnesses learnt on the following day that the deceased had been killed by the shot that was fired when they ran away.

None of the crown witnesses were in a position to state who fired the fatal shot. Siphoh Mahlalela (PW1) a civilian who had alighted from the landrover, told the court that he concluded that the shot was fired by the second soldier to alight from the landrover and who was said to have been wearing a red top. Siphoh was, however, not in a position to identify the person who was said to be wearing a red top. There is no evidence that the accused is the soldier who is said to have been wearing a red top. Alvinah Malindzisa gave an account of how she heard a gunshot and saw somebody falling. She was not in a position to confirm that the second soldier to alight was wearing a red top. She was not in a position to identify the two soldiers who were on the ground and did not see which one of them fired the fatal shot.

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The investigating officer 2056 Sergeant Joseph Dlamini of Lomahasha Police Station told the court that he received a report of the shooting from the police at Shewula Police Post. The police to whom the report was made at Shewula were not called to give evidence as to what the report was, the circumstances under which it was made and as to the explanation as to the circumstances under which the deceased was shot. Sergeant Dlamini proceeded to the scene and saw the body of the deceased. The deceased had a bullet wound with an entry point on the back of the chest and an exit point on the front. Sergeant Dlamini spoke to the accused and informed him of the investigation into the death of the deceased. According to Sergeant Dlamini the accused handed a 7.62 calibre rifle to him (Exhibit 1). A magazine was fitted to the rifle. According to Sergeant Dlamini, the accused removed the bullets from the magazine before handing over the rifle. The number of bullets removed was not recorded. Nothing appears to have been said by the accused when, according to Dlamini, the rifle was handed over. If anything was said Sergeant Dlamini would have been obliged, in terms of the caution he states he had administered to the accused, to reduce it to writing. Sergeant Dlamini was next shown an USDF landrover. The driver's door window was completely smashed. Pieces of glass from the window were scattered inside the front of the landrover. A stone, slightly bigger than a tennis ball was lying in between the two front seats.

According to Sergeant Dlamini, the accused explained that the stone in the landrover had been used to

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smash the driver's window. No enquiries appear to have been made to ascertain when and by whom the window had been smashed. The summary of evidence filed by the crown indicated that Sergeant Dlamini would testify that the accused informed him that the window was smashed by the deceased. Sergeant Dlamini did not however give such evidence in court. No explanation was given by the crown as to where this evidence was gathered in the preparation of the summary. It was open to the crown to inform the court either that Sergeant Dlamini had deviated from the contents of his statement or that there had been an error in the preparation of the summary. Sergeant Dlamini made no enquiries as to the relevance of the smashed window to the death of the deceased which he was investigating at the time. A search was

then made in the area and pieces of glass were found at a spot in the area where the accused stated the landrover had been parked when the window was smashed. A further search was made in the area for any empty cartridges. It was already late at night. Nothing was found. sergeant Dlamini returned to the scene with another police officer on the 4th January 1995. The area was searched and an empty cartridge was recovered.

It was sergeant Dlamini's evidence that the empty cartridge and the rifle (exhibit 1) were sent to the Police Headquarters for onward transmission to South Africa for ballistics analysis. No evidence was led of how the exhibits were sent to Police Headquarters and from there, to South Africa. The need for the care and proper sealing of such exhibits has been dealt with in several cases in the

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past. The practice has been, in the absence of admissions by the defence, for the police officers involved in the receipt and transmission of such exhibits to give evidence and complete the chain of events leading to the examination and return of the exhibits.

It appears that the crown is in possession of a report of the ballistics expert's examination which was conducted on the empty shell and the rifle in South Africa. The summary of evidence which was placed before the Chief Justice with the application for the summary trial of the accused in the High Court in terms of Section 88 bis of the Criminal Procedure and Evidence Act no. 67/1938 did not reflect that any evidence would be led regarding any link between the empty cartridge and the rifle. The person who examined the two exhibits is not reflected as a witness in the summary. An explanation was made by crown counsel from the bar that an additional summary of evidence reflecting the report of the ballistics expert who examined the exhibits was sent to the Registrar of the High Court. That additional summary was not placed before the Chief Justice for inclusion in the original summary. The crown apparently served the additional summary on the defence sometime after the commencement of his trial on the 8th November. It appears from statements made from the bar that the defence indicated at that stage that it would object to the additional summary and in particular, the fact that the crown indicated that it intended applying to hand in the report without calling the ballistics expert. No steps were taken by the crown at that stage to have the ballistics

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expert subpoenaed to give evidence. His name does not appear on the list of witnesses which the Registrar was to subpoena. Mr Ngarua for the crown applied for a post ponement in order to have the expert called. He could give no reason for the prosecution's failure to deal appropriately with the evidence in its possession. No explanation was given for the absence of any evidence on the movement of the exhibits from Lomahasha to South Africa. No explanation was given as to why the expert was not subpoenaed as soon as the defence indicated that it would object to his report being handed in without him being called. The case of R.V. SIMELANE AND OTHERS (2) 1979-1981 SLR 251 is no licence for the shoddy and indifferent approach of the investigating officer and the prosecution in this case. The application for a post-ponement was refused.

The fact that the accused is said to have handed over a rifle to the police is not evidence that he fired the fatal shot. The rifle is not linked to the fatal shot. No investigations were carried out as to which member of the USDF the rifle received by police was allocated, particularly for the day in question. If the rifle had been allocated to the accused and was found to be linked with the shot that was fired at the deceased, that would amount to circumstantial evidence calling for an explanation from the accused . There is no such evidence. It is common cause that there were at least 4 soldiers at the scene. None of the soldiers appear to have been questioned by the police. The identity of the soldiers who were on the landrover has not been established. The evidence of the recovery of the

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rifle and the pointing out of the shattered window on the landrover does not serve to identify the accused as one of the soldiers who were at the scene at the time of the shooting. These are matters which should have been properly investigated. A duty rested on the prosecution to draw the attention of the investigating officer to the shortcomings of the investigation. Above all, the prosecuting crown counsel should have acquainted himself fully with the case he was bringing to court, ensuring that he had witnesses to deal with the essential and material aspects of the crime with which the accused is charged and which the crown has to prove.

The crown has failed at the conclusion of its evidence, to furnish any evidence either identifying the accused as one of the soldiers who were present at the scene or in anyway linking him with the death of the deceased. The accused is found not guilty he is acquitted and discharged at the close of the crown's case.

B. DUNN ACTING

CHIEF JUSTICE