

IN THE HIGH COURT OF SWAZILAND

CRIM CASE NO.166/98

IN THE MATTER BETWEEN

REX

VS

ZACHARIA SACOLO

PETROS HLATSHWAYO

CORAM

: MASUKU J.

For the Crown

: MRS M. DLAJVONI

For the Accused

: MR L. M. MAZTYA (Instructed by

RULING ON APPLICATION FOR ACQUITTAL AND DISCHARGE

AT CLOSE OF CROWN'S CASE 9/11/1999

The two accused persons are Police Officers who were formerly stationed at Gege Police Station. They are facing two counts, namely culpable homicide and assault with intent to cause grievous bodily harm, respectively.

On the first count, it is alleged that the said accused persons, acting jointly and with common purpose unlawfully assaulted THULASIZWE DUBE and inflicted upon him certain injuries which caused the death of the said deceased person on the 28th April, 1998. It is further alleged that the assault occurred at the Gege Police Station, Shiselweni District.

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On the second count, it is alleged that both accused persons, did on the 27th April, 1998, acting jointly and with a common purpose unlawfully assault Nkosinathi Oscar Dlamini by slapping, punching and kicking him with the intent of causing him grievous bodily harm. This assault was also alleged to have taken place at Gege Police Station.

The accused, who were both represented by Mr L.M. Maziya pleaded not guilty to both counts and their plea was accordingly confirmed by their Counsel. The Crown, in support of the charge led the evidence of twelve witnesses and at the close of the Crown's case, an application was moved for and on behalf of the accused persons for their acquittal and discharge in terms of the provisions of Section 174 (4) of the Criminal Procedure and Evidence Act No.67/1938 (as amended).

The sub-section in question reads as follows:-

"If at the close of the case for the prosecution, the Court considers that there is no evidence that the accused committed the offence charged or any other offence of which he might be convicted thereon, it may acquit and discharge him."

Clearly, from the Legislative nomenclature, the trial Court has discretion whether or not to grant an acquittal and discharge, depending upon the particular attendant circumstances of the case. The test to be applied in considering whether a discharge should be granted was stated with absolute clarity by Dunn J in the case of THE KING v DUNCAN MAGAGULA AND 10 OTHERS, Criminal Case No.43/96. It is whether there has been led evidence on which a reasonable man acting carefully might convict and not should convict.

In the same case, Dunn J. proceeded to hold rightly in my view that the credibility of Crown witnesses

even at this stage also falls to be considered and that where the credibility of a witness is so utterly destroyed that no part of it can be relied upon, this should be considered in granting a discharge. Put differently, credibility can play a role only if a very high degree of untrustworthiness has been exhibited by a witness or his credibility has been irretrievably shattered such that Ms evidence cannot be believed. See *S v MPETHA & OTHERS* 1983 (4) S.A. 262 at 265.

It is imperative for me at the outset to state that according to the Crown's evidence, especially that of PW1 3358 Constable Muzi Jele, confirmed by PW 2 3746 Constable Masimini Ndlangamandla, AI went into the Police Station dragging the deceased and A2 dragged Nkosinathi Oscar Dlamini into the Police Station. PW2 Constable Ndlangamandla proceeded to say that AI assaulted the deceased forcefully with a fist and the deceased fell down and was eventually conveyed to the Nhlango Health Clinic,

FW2 proceeded to state that A2, on arriving at the Police Station with Mcosinathi Oscar Dlamini, the said accused person proceeded to slap Oscar and kicked him asking him if he knew that he was a Police Officer. He later instructed PW2 to detain the said Oscar in the Police cells.

From this evidence, it is abundantly clear that there was no common purpose established by the Crown between the accused in respect of both counts. I am satisfied from the evidence that A2 never touched nor assaulted the deceased and as such I have no hesitation in holding that A2 be and is hereby discharged on count 1, culpable homicide. No evidence linking him to the deceased's alleged assault was led and I understood Mrs Dlamini for the Crown to concede this. A2 is accordingly discharged on count one.

In like manner, no evidence was led by the Crown implicating AI in the assault of Nkosinathi Oscar Dlamini. It was alleged that A2 was the one responsible for assaulting the said Oscar Dlamini. For that reason, I find AI not guilty on the second count and I accordingly acquit and discharge him.

What remains for me to now do is to analyse the Crown evidence in Count 1 insofar as it relates to AI. My task will be to determine whether a prima facie case has been made out by Crown against this accused person and whether the evidence is credible or has been so irretrievably shattered and so untrustworthy that it cannot be believed. In the latter event, I will have no option but to acquit and discharge the accused

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person. This is the same approach that I intend to adopt in dealing with Crown's evidence against A2 in respect of the second count. I will commence with the evidence against AI on the first count.

The Crown's evidence is that the two accused persons were boarding Muhle Tours Bus Service which was travelling from Nhlango past Gege Police Station. In that bus was PW 1, the two accused persons, Oscar Dlamini and deceased, who were travelling together. Oscar and the deceased were visibly inebriated and continued to imbibe alcohol in the bus. PW 1 was seated and in front of Mm was AI, A2 was standing at the back of the bus.

Oscar and the deceased started insulting A 1, accusing him of arresting them. They hurled verbal abuse at him calling him a Police dog, pointing fingers at him and they were generally a nuisance such that other passengers warned them to desist from their unbecoming conduct. Incensed by this conduct both accused persons decided to alight with the two some and dragged them into the Police Station. Needless to say, PW10 and the deceased resisted. AI dragged the deceased whilst A2 dragged PW 10.

According to PW 2 Constable Ndlangamandla, A2 entered first and AI came with the deceased. At that point, PW 2 was detaining PW 10 on A2's instructions when PW 10 told the Police Officers not to assault the deceased because he had epileptic fits. AI then struck the deceased with a fist and he fell down to the floor. When he tried to raise his head, he was unable, as he had hit the floor very hard. The deceased was then taken outside for fresh air and when first aid techniques failed to yield the desired results, the deceased was conveyed to Gege Clinic where he was attended and later transferred to Nhlango Health Centre, where he died after eight hours of his admission.

Mr Maziya put to PW2 that the deceased fell as a result of epileptic fits but PW 2 was adamant that the deceased was assaulted by AI. It was further put to this witness that

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after the deceased fell, he had convulsions and was foaming in the mouth. This PW 2 vehemently denied, saying he never saw these.

PW2's evidence in this regard is highly unsatisfactory as I will demonstrate from excerpts as recorded in my notes. In Ms examination in chief PW 2 stated that PW 10 volunteered information about the deceased's fits. In cross-examination, Mr Maziya posed the following question.

Q: I am instructed that it was at that stage (i.e. after the deceased was lying on the floor experiencing convulsions and foaming at the mouth) that you enquired from Oscar what was wrong with the deceased.

A; Oscar confirmed that the deceased suffers from epileptic fits

In re-examination, the following was stated:

Q: Did you ask Oscar what was wrong with the deceased A: Yes.

Q: Why did you ask

A: Because he had said that his brother had epileptic fits

The Court then posed the following questions

Q: What caused you to ask what was wrong with the deceased A: It is because the Dlamini boy (Oscar) had told me earlier that his brother had epileptic fits.

Q: Was there anything strange in the deceased's behaviour A: No.

This appears to me to be a design by PW2 to lie to this Court. If there was no strange or untoward behaviour by the deceased, there would have been no reason for him to ask PW 10 what was wrong with the deceased. In my view, PW2's evidence in this regard is totally untrustworthy. This is moreso in the light of evidence by other

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Crown witnesses that the deceased suffered convulsions and foamed in the mouth. These include PW 3 2045 Sgt. Phineas Ngwenya, PW 5 Nurse Lawrence Mshiyeni Sithole, and 3421 Detective Constable Patrick Dlamini,

It is also unsafe to rely on the evidence PW 2 Masimini Ndlangamandla for the following reasons. Firstly, there is the evidence in chief of PW 4 3421 Detective Constable Patrick Dlamini where he stated that he conveyed the deceased to Gege Clinic in Ms own vehicle bearing registration number PLF 177 T. It is his further evidence that at about 15h00 on the fateful day, he went to the Police Station Court yard and there found a person lying on the ground and enquired from PW 2 what was wrong with that person.

In reply, PW 4 states that Constable Ndlangamandla informed him that the said person (the deceased) fell as a result of an attack by epileptic fits. This evidence collides head on with the evidence that the said Constable Ndlangamandla led before this Court. It is destructive to Ndlangamandla's credibility.

The reason for this contradiction is not difficult to find. The answer lies in the evidence of PW 7 Nonhlanhla Monica Magongo, who testified that she was at the Gege Police Station when this incident occurred. I will deal with her evidence in greater detail later. Of interest at this juncture is that PW 7 stated that Masimini was called by the Investigating Officer at Nhlangoan and was forced to make

another statement, different from the one he had made at Gege. In particular, this witness stated that the Investigating Officer Mncane Nxumalo PW 11 asked Masimini as she stood outside the office within earshot what caused the deceased's death and to which Masimini said he saw the person fall and when he asked Oscar about it, Oscar said he had epileptic fits.

Nxumalo accused Ndlangamandla of lying and told him to go outside and further threatened that if Ndlangamandla did not tell the "truth", he would lose his job as a Police Officer. This was not corrected by the Crown in re-examination. This is clear evidence why Masimini gave such contradictory evidence, which was clearly a fabrication of what he had witnessed. That was enough incentive for him to lie before

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this Court. For that reason, I am of the considered view that his credibility is irretrievably shattered and I cannot possibly rely on his evidence.

It is worth noting that PW 11 1608 D/Asst. Spt. Ncane Joseph Mkhathshwa confirmed that he was unhappy with Ndlangamandla's earlier statement and caused the said Ndlangamandla to change the same. Ndlangamandla on the other hand vehemently denied having recorded a statement different from what he had recorded at the beginning under oath. This constitutes a coup de grace to Ndlangamandla's credibility and further renders his evidence completely devoid of any credence.

Another witness who adduced evidence that linked AI to the death of the deceased is PW 7 Monica Nonhlanhla Magongo. Her evidence was to the effect that on the 28th April, 1998, she was at Gege Police Station when AI and A2 brought in the deceased and his companion Oscar Dlamini. She followed AI into the Station. Her mission was to collect money from various Police Officers at the Gege Police Station to whom she had sold and delivered chickens. In particular, she had gone to collect money from the accused persons.

She further testified that AI moved the deceased to a particular spot, away from the counter. At that point, she, PW 7 decided to face downwards and then heard something, a clap or a fist. She said that the reason why she looked down was fear as she had witnessed an assault of PW10 at the hand of some Police Officers. The deceased then fell on a cracked floor tile. Oscar then told Sacolo AI that the deceased had epileptic fits and whenever he was seized by an attack, his grandmother would offer him some water and he would then recover. I pause to state that there is a serious contradiction in the Crown's ev

idence as to when PW 10 exactly said the deceased suffered epileptic fits.

She, PW 7 was asked by Mrs Dlamini for the Crown how loud the noise she heard was and she said the noise was not very loud and she could not tell the nature of the noise as immediately after the noise the deceased fell down. PW 7 helped put the deceased into the motor vehicle which transported him to the Gege Clinic.

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In cross-examination, Mr Maziya put the following question to PW 7, who, like PW 2 was forced by PW 11 to change her earlier statement.

Q: Were any questions put to you

A: Yes

Q: What were the questions

A: I was asked what Sacolo used to assault the deceased to cause Mm to fall

Q: What did you say

A: I said, I did not see that Sacolo hit him or who it was that hit him. I saw the deceased when he had

fallen down.

From the above questions, it is clear that PW 7's evidence in cross examination differed from what she had said in chief. Even in her evidence in Chief she stated that, she was facing down and did not see what happened to the deceased. Another factor which I consider imperative is that this witness was subjected to prolonged harassment by the Police, particularly PW 11, who wanted her to say something that she did not know. After the statement she made in Gege on the 28th April, 1998, she was caused to attend at Nhlanguano Police Station on the 29th and 30th April, 1998, where she was forced to change her statement.

It was her evidence under cross-examination that she was threatened with imprisonment by the Police Officers and was also verbally abused. She was called corrupt and was accused of having been bribed by the accused persons. Furthermore, she was accused by PW 11 and a Magongo Police Officer to be a lover to the accused persons.

One can not know the effect of these threats on the witness. I find that it is unsafe to rely on her evidence in this regard because she clearly changed her story under cross-examination. Further, she did not see what happened to the deceased as according to her evidence in re-examination she saw the deceased when he was on the floor.

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The evidence I have analysed suggests that the deceased fell as a result of an epileptic attack and the nurse and the Doctor who examined the deceased in their testimony were of the opinion that the deceased's condition on admission was consistent with an epileptic attack. The evidence by the accused's mother and teacher that the deceased did not have epileptic fits does not hold in the light of the evidence of the Doctor and nurse together with the evidence of PW 2 and PW 7, who were eye witnesses. Even with epileptic attacks, there is always a first time.

The evidence of PW 10 on the deceased's death can also not be safely relied on. According to PW 7, PW 10 was motherlessly drunk on the day in question. When asked by the Police what happened on the 28th April, 1998, he said he was so drunk such that he could not remember. Even when he was called to change his statement, he told PW 11 in Nhlanguano, that he did not remember what had happened and this was said in PW 7's presence. PW 10 now says he did not tell the truth because he was afraid of being assaulted by the Police. Can his evidence be possibly relied on? I cannot rely on it. Evidence is that he was highly inebriate and his initial response in my view was consistent with the truth.

PW 7 further mentioned that when they were in a Police van, PW 10, having been told that the deceased had died, in a soliloquy PW 10 said the deceased probably died due to falling from the bus. If indeed the PW 10 knew that the deceased died as a result of the assault, why would he have posed the rhetorical question as to the cause of deceased's death. One cannot rule out the possibility that PW 10 like, PW 2 and PW 7 was coerced to give this story, as he was also caused to change his statement by PW 11.

In the result, I come to the inevitable conclusion, in the light of the contradiction of the Crown's evidence that no prima facie case has been made out against A1. It is my considered view that the Crown's evidence cannot be believed for the reasons earlier traversed. No reasonable Court can possibly convict A 1 on Count 1. I accordingly acquit and discharge Mm on this count as well.

Turning to A2 on count two, the Crown led the evidence of PW 10, the complainant. The complainant, in his evidence stated that he left Nhlanguano in a Muhle Tours bus

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in which the accused were passengers. He called A 1 a fool and said if the bus was his, he could stop it and challenge A1 to a fight. When they arrived at Gege, A2 told him that he was under arrest and he was taken by A2 into the Police Station.

In the Police Station, PW 10 states that A2 then assaulted him using fists and also kicked him. Other police officers joined in the fray and assaulted PW 10. PW 10 then proceeded to say that he was assaulted by both accused persons together with three other Police Officers whom he does not know. The following day, he was taken to Gege Clinic. It is not clear what happened there.

He was later taken to Nhlanguano Health Centre, where he was first turned away because he had arrived late. The following day, he was attended by a female doctor, who only touched him, gave him some tablets and discharged him.

According to his evidence, PW 10, suffered injuries on his face and one tooth broke as a result of the assault. PW 7 also stated that PW 10 was assaulted by a number of Police Officers, including A2 and PW 2. In her words, PW 10 was severely assaulted. In his evidence, PW 11 also said that PW 10 had been severely assaulted such that he could not stand up and his face was swollen. Furthermore, both eyes along the sides were blue and PW 10 complained of a painful stomach and stated that his head was not stable. PW 11, then ordered that PW 10 be taken to hospital for medical attention. PW 11 also stated that he enquired from PW 10 as to who had assaulted him and he said that he was drunk and could not identify his assailants who were Police Officers.

There is a serious contradiction in the Crown's story relating to this count PW 2 stated that PW 10 was assaulted by A2 alone. PW 7 and PW 10 implicate other Police Officers, including PW 2 himself. The question becomes which story must the Court believe in the light of the contradictory evidence adduced by the Crown?

There is also a serious contradiction between the evidence of PW 10 and PW 11 regarding PW 10's assailants. PW 11 said after the day of the incident, he asked who his assailants were and PW 10 said he could not identify them because he was drunk, yet in Court, PW 10 said he was assaulted by the accused persons. Judging from the manner that investigations were conducted in this matter, including the coercion of

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some witnesses, It is not unreasonable to infer that the identity of culprit Police Officers was suggested to PW 10 since he had earlier said he could not identify them.

There is also an insuperable difficulty regarding the injuries sustained during the assault. The evidence of the serious condition of PW 10 given by him, PW 7 and PW 10 is not borne out by the medical report which was handed in by consent. It is not even borne out by the Doctor's evidence. It is also not supported by PW 10's own evidence under cross-examination where he stated that the doctor only touched him and gave him tablets. No mention is made of a broken tooth, swollen face bleeding or signs thereof. All that the medical report indicates is that PW 10's physical powers and general state of health was stable and his clothing was intact.

It made reference to periorbital haetoma i.e. blue/black colouring over the eye, which the Doctor attributed to bleeding under the skin surrounding the eye. It is clear therefore that PW 10's condition was extremely exaggerated in this Court and renders the Crown's case not worthy of belief.

The last question to be asked is whether A2 can be said to be the one who delivered the blow, on PW 10's eye, given the evidence that was led, such as to lead a reasonable Court to convict him? My answer is in the negative. No direct evidence was led pointing to the fact that the accused inflicted that blow. Many Police Officers were alleged to have assaulted him and they may have been responsible for the bruise mentioned by the Doctor. The evidence of PW 10 that it is A2 who assaulted him cannot stand in the light of his state of sobriety and the answer he gave to PW 11 's enquiry as recorded above, regarding the identity of Ms assailants.

In the premises, I am of the view that A2 ought to be acquitted and discharged on Count 2 at the close of the Crown's case and it is so ordered.

T. S MASUKU

JUDGE