



THE HIGH COURT OF SWAZILAND

REX

V

MNCAYI MTHETHWA

Cri. Trial No. 26/1999

Coram

SAPIRE, CJ

For Crown
For Defence

Mr. M. Nsibandze
Mr. B. Simelane

JUDGMENT
(09/11/99)

The accused is charged with the crime of murder it being alleged that on or about 20th June 1998 and at or near Makholweni area in the Shiselweni District the accused wrongfully, unlawfully and intentionally killed Zephania Maraiza Dlamini. The accused pleaded not guilty and was represented by Counsel. At the onset of the case there was admission regarding the identity of the deceased and the cause of death and that the deceased was a man who was approximately 65 years of age. The death occurred on the same day because of certain injuries inflicted on him and the cause of the death was liver lacerations as a result of a gun shot.. The shot injured through the right arm, past through the intercostals space and came out in the right intercostals space. The prosecution then led its evidence and the 1st witness was a police officer. He explained that he went to the scene of the crime where it had been reported that a person who had died at the hospital had been injured. As a result of his investigation he arrested the accused and then followed evidence which I ruled inadmissible in the trial within a trial. The evidence was inadmissible because it amounted to a confession which had not been confirmed as required by the provisions of the Act. There was however evidence led connecting the accused with the death of the deceased. The evidence falls into 3 categories..

Firstly I will deal with the evidence of the accused's son. This accused's son is known as Robert Mthethwa and his evidence the crown gave notice with the service of the indictment that evidence by this person will be led. The nature of the evidence appeared in the summary and when time came I was informed by Mr. Nsibandze that it was not his intention to call this witness. In view of the nature of the evidence I find it my duty to call

him myself. This I did after the crown had closed its case. This witness said the accused was his father and explained how his father asked him to accompany him with a digging tool to hide certain objects by entering them in a hole in the veld. These objects turned out to be a gun and ammunition which are before the court and were rolled in a plastic bag. He apparently asked his father what this is all about and the father told him that he had injured the deceased with the gun and the object was to hide this. The father was arrested shortly thereafter.

The defence has argued that this witness should be treated as an accomplice and I should look for corroboration without which this evidence would not be sufficient on which to base the conviction. I have some reservation whether this witness Robert is indeed an accomplice witness. But I will treat his evidence on the basis which has been suggested is proper. It was put to him by the defence that he was a liar. He maintained the position he had taken under cross examination and did not budge. I can imagine the anguish of a person like this. He has been called upon to give evidence against his father in a serious case. The temptation to protect his father is..... There is no reason suggested why he should force him to implicate his father in the commission of such a serious offence. But as I say he is to be pitied and sympathised with in various positions in which he was placed by the accused.

There is further evidence that is the evidence of Albert Dlamini who was an elder in the area. He also testified and he gave the impression of a person who was respected and enjoyed the respect of the people in the area where he lives. He explained that he was called upon by the police to assist in the search for a cartridge which may have been involved in the death of the deceased. He was at one stage while on the way to the search came across the same policeman and the accused and a third person who has since died. Robert Dlamini said that the accused freely said to him in the presence of the other person that he was the one who had killed the deceased because the deceased had interfered with his family. This witness was cross-examined on the basis that he bore ill will to the accused because of some sisa transaction. The witness denies that there was any sisa transaction at all. In this he was contradicted by the accused and eventually by the accused's nephew who was also called to testify on this point. The matter it was suggested lends weight to the evidence of the accused to such an extent that I must come to the conclusion that the witness was hostile to the accused person. I do not find that the defence evidence on this point is of such a weight that I must find that Mr. Dlamini is telling untruth in regard to the sisa transaction. But it is difficult to see why a sisa transaction should have led to such enmity so as to induce an otherwise honourable man to falsely implicate his neighbour for hisWhatever deficiencies there may be in the evidence, I am not sure that there are any, but any deficiencies there are, are completely outweighed by the fact that the accused admitted not to one person but to two persons that he was responsible for the wounding and eventual death of the deceased.

The third category of evidence to which I have referred is the pointing out. The evidence is that after the accused had been arrested and had made a statement he was taken out from the Police Station to a place which is said to be the scene of the offence. Not only the accused but his son and a number of policemen went on thisHere according to the Police evidence the accused pointed out a spot in the field where some digging took place with an instrument provided by one of the local residents and the exhibit comprising the firearm and ammunition was there found holed up in a plastic bag that has been described by the accused's son. I think I would have a look that the son said that this was not the spot where they buried the incriminating material. I think that is rather a weak effort to try and

assist his father. The fact of the matter is that the plastic bags containing arms and ammunition are not found everywhere in the fields of Swaziland and it is a remarkable incidence that the exhibits were found at that very spot pointed out by the accused person. The accused

person who testified claimed that he did not point out the spot at all and that the hole was opened by the woman from whom the police had acquired the digging instrument. This woman had been sitting in court while this evidence was being led and when it became apparent what the accused was saying, I asked him to point out the woman in court which he did. I immediately told her to leave the court room and called her as a witness after the accused had finished testifying. She controverted the accused's version of what took place and supported the version given by the Police. It is the latter version of what took place that I therefore accept. It is argued that this evidence of the pointing out was inadmissible because it amounted to an admission and was not shown to have been freely and voluntarily made. When the Police gave evidence of the pointing out they had denied any assault and had spoken of two warnings given to the accused. Instead of challenging the evidence of pointing out as being inadmissible the defence took the attitude that it did not happen. This in itself is inconsistent because what the defensive case amounts to this is that the accused was forced not to point out the place where the exhibits were hidden. I have no doubt that at the time this was all taking place the accused's attitude of what had happened was that he was really admitting it and believe that he had some justification for killing the deceased as he explained to Albert Dlamini. On the basis of these three categories of evidence which tend to adhere and to provide strength each for the other I can turn to no other conclusion than that it was the accused who shot and injured the deceased with a firearm and that he did so either intending the death of the deceased or fired the shot not caring whether death will occur or not. In these circumstances, I can come to only one verdict and that is that the accused is guilty of murder as charged.

S.W. SAPIRE, CJ