

IN THE HIGH COURT OF SWAZILAND

CRIM. CASE NO. 168/98

IN THE MATTER BETWEEN:

REX

Vs

GOVU DLADLA AND 3 OTHERS

CORAM : MASUKU A. J.

FOR THE CROWN : MR. D.G. WACHIRA

FOR THE ACCUSED : MR. Z.W. MAGAGULA

RULING ON APPLICATION IN TERMS OF SECTION 174 (4) OF THE CRIMINAL PROCEDURE AND EVIDENCE ACT, 1938,

AS AMENDED 20/05/99

The accused stand charged on Count one, with the crime of murder, it being alleged that upon or about the 15th March 1998, at Mashobeni area in the Shiselweni District, the said accused persons, acting jointly and with a common purpose did unlawfully kill THUBESI DLADLA.

On Count 2, Accused 1 is charged with contravening the provisions of Section 11 (1) of the Arms and Ammunitions Act, 1964, as amended, it being alleged that upon or about the 5th December 1997, at Mashobeni/Mkhitsini area, the said accused person, not being a holder of a permit or licence to possess a firearm, did unlawfully possess one .303 rifle serial number E564751. By consent between the Crown and the Defence attorney, the serial number of the firearm was amended to read ERA564751.

2

Before the accused were called upon to plead, the Crown withdrew charges against Accused 5, one Sicelo Mavuso. Thereafter, the four accused persons pleaded not guilty to Count one and Accused 1 pleaded not guilty to Count 2.

After the Crown closed its case, Mr. Magagula, who appeared for and on behalf of all the accused persons moved an application in terms of the provisions of Section 174 (4) of the Criminal Procedure and Evidence Act, 1938, as amended, for the accused persons to be acquitted and discharged on the first count and for Accused 1 to be acquitted and discharged on the second count. This application was vigorously opposed by the Crown.

Section 174 (4) of the Criminal Procedure and Evidence Act, 1938, as amended, reads as follows:-

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

As correctly observed by Dunn J, in THE KING v DUNCAN MAGAGULA AND 10 OTHERS, CRIMINAL CASE NO, 43/96 (unreported), the Section is of similar effect with the South African Criminal Procedure Act 51 of 1977. In the same case, Dunn J. laid out, the test to be applied in such applications as being whether there is evidence on which a reasonable man, acting carefully might or may convict - See also Commentary on the Criminal Procedure Act, Du Toit et al P.174 and the cases therein cited.

The test is not should a reasonable man convict - See GASCOYNE v PAUL and HUNTER 1917 TPD 170; SUPREME SERVICE STATION (1969) (PVT) LTD v FOX and GOODRIDGE (PVT) LTD 1971 (4)

SA 90 and S V MORINGER AND OTHERS 1993 (2) SACR 268.

From the test laid out above, it is clear that the decision to refuse a discharge is a matter solely within the discretion of the trial Court. This is borne out by Legislature's

3

choice of language, namely, the use of the word "may". The exercise of this discretion may not be questioned on appeal. See GEORGE LUKHELE AND 5 OTHERS v REX Court of Appeal Case No. 12/95, at Page 8 where the learned Judges of Appeal stated as follows.

"It is now well established that no appeal lies against the refusal of the trial Court to discharge an accused at the conclusion of the prosecutions case".

Having said this, the discretion must be properly exercised, depending on the particular facts of the matter before Court.

Having ascertained the test to be applied as herein above set out, the question that arises is whether or not the credibility of Crown witnesses should be taken into account in deciding whether or not to grant a discharge.

In S V MPETHA AND OTHERS 1983 (4) SA 262 at 265 D - G, WILLIAMSON J,

stated the position of the law as follows:-

"Under the present Criminal Procedure Act, the sole concern is likewise the assessment of the evidence. In my view, the cases of BOUWER AND NAIDOO correctly hold that credibility is a factor that can be considered at this stage. However, it must be remembered that it is only a very limited role that can be played by credibility at this stage. If a witness gives evidence which is relevant to the charges being considered by the Court, then that evidence can only be ignored if it is of such poor quality that no reasonable person could possibly accept it. This would really only be in the most exceptional case where the credibility of a witness is so utterly destroyed that no part of his material evidence can possibly be believed. Before credibility can play a role at all, it is a very high degree of untrustworthiness that has to be shown. It must not be overlooked that the triers of fact are entitled 'while rejecting one position of the sworn testimony of a witness, to accept another

4

portion' See R v KHUMALO 1916 AD 480 at 484. Any lesser test than the very high one which, in my judgement, is demanded would run counter to both the principle and the requirements of S. 174 ".

In the Kingdom of Lesotho, this very question was considered by Cotran C.J. in the case of REX v TEBHOHO TAMATI ROMAKATSANE 1978 (1) CCR 70 at 73-4.

The learned Chief Justice propounded the law as follows:

"In Lesotho, however, our system is such that the judge (though he sits with assessors is not bound to accept their opinion) is the final arbiter on law and fact so that he is justified, if he feels that the credibility of the crown witness has been irretrievably shattered, to say to himself that he is bound to acquit no matter what the accused might say in his defence short of admitting the offence ".

In the case of THE KING v DUNCAN MAGAGULA AND 10 OTHERS (supra), Dunn J, was of the strong persuasion that this Court should follow a similar approach as that in Lesotho, proper regard being had to the similar position in which trial judges are placed in both Kingdoms, Similarly, I endorse that view.

Having set out the law regarding applications in terms of the provisions of Section 174 (4), I shall now proceed to analyse the evidence adduced on behalf of the Crown in order to ascertain whether there is evidence that the accused persons committed the offences preferred against them or any other offence of which they might be convicted.

I will preface the analysis of the evidence by stating that the Crown's evidence that the accused killed the deceased is in large measure circumstantial.

In dealing with Crown witnesses, I will consider the evidence adduced against each of the accused persons, beginning with Accused 1. PW1, Lombango Kunene is a wife to Accused No. 1 and the mother of the deceased, who was Accused 1's son.

Her evidence is that she had lived peacefully with Accused 1 until a dispute over land arose between her and Accused 1. At one stage, the matter was reported to the Chief

5

of the area and later to Ndabazabantu in Nhlango, for purposes of resolution. The dispute was over ploughing fields, which PW1 alleges was allocated to her by the Chiefs kraal where she had khontaed. On the other hand, Accused 1's version was that the fields were allocated to him by the Chief, and he in turn, gave the fields to PW1 for cultivation purposes.

Sometime in October, 1996, PW1 and the deceased were ploughing the fields, whereupon they were confronted by Accused 1 and 4. Accused 1 went straight to PW1, carrying a firearm and pointed it at her. Accused 1 told PW1 to stop cultivating the fields, failing which he would shoot her. It is not suggested that A4 did anything to the deceased at all from PW1's evidence. She proceeded to state that the relationship between her and Accused 4 became strained.

There is clearly a long lapse between this confrontation and the death of the deceased; in the excess of one year. There was no other dispute that arose between the two.

From this evidence, it can hardly be said that Accused No. 1 had a motive for killing the deceased because he never confronted the deceased nor did he ever threaten him in any manner whatsoever. In cross-examination, PW1 conceded that the dispute over land was only between PW1 and Accused No. 1 and did not involve the deceased. If there was a person that Accused 1 had a motive to kill, it would be PW1. In view of the foregoing, I cannot find that Accused 1 had a motive for killing the deceased.

The next witness was Adam Mhlanga, (PW2) whose evidence was that he was Accused 1's nephew. On the 16th March 1998, he went to Accused 1's homestead to deliver a horse in respect which the accused person had placed an order. He found AI alone at his home and before PW2 could sit down, AI told him that the deceased had died at a place which AI pointed out. AI said that Dee Dladla (A3) killed the deceased on his own and AI gave money to A3 to return to Thembisa, where A3 ordinarily resided. AI then asked PW2 to look after his cattle as AI was to attend a trial at Nhlango.

In cross examination by Mr. Magagula, PW2 conceded that on the Wednesday 18th March 1998, AI complained to him that he was told by A4's wife that the deceased

6

had disappeared and was aggrieved that PW1 had not taken it upon herself to inform him (AI) of his son's disappearance. I disbelieve PW2's evidence because AI could not have voiced his complaint about PW1 not advising him of the deceased disappearance if he knew that the deceased had died, which PW1 said AI told him on the 16th March 1998. This is clearly contradictory and rendered PW2's evidence unreliable.

Furthermore, there is a wide age difference between AI and PW2, possibly more than 50 years. It is inconceivable that AI would readily tell PW2 about this incident even before PW2 had taken a seat. There was no suggestion that AI and PW2 were so close so as to render AI likely to volunteer such damning evidence readily to his nephew who was many years his junior.

I was also not impressed with PW2's answers to enquiries by Mr. Wachira. To demonstrate this, I will quote certain portions of his evidence as recorded in my notes:

Q: Did he (A1) say who sent Dee (A3) to kill the deceased A: He did not

Q: Did you ask if Dee (A3) was alone A: I was afraid to ask him

Q: Why

A: I just panicked

Q: Did he (A1) tell you how much he gave to Dee (A3) A: No. I did not even ask him how much

Q: Did he tell you how he knew that Dee killed the deceased

A: No

Q: Why did you not seek details about the deceased' death A; I was afraid to ask him

7

Clearly, PW2's answers are unsatisfactory. If his uncle had volunteered such information regarding his cousin's death, he would have put these logical questions to his uncle. There was no reason in my view for him to be afraid and I attribute this solely to him being untruthful. To further substantiate this, I will quote excerpts or some portions of PW2's cross-examination by Mr. Magagula.

Q: Is there any reason why A1 would tell you about Dee (A3) killing the deceased

A: No

Q: Did it cross your mind to report what A1 had told you about deceased's death A: No

Q: Even when you heard that the deceased's body had been found, you still did not report A:
No

In re-examination, Mr. Wachira posed this question

Q: Did you not refer your uncle to the fact that he had told you about Thubesi's death and later complained about PW1 not telling him of deceased's disappearance.

A: No. I did not.

From the above excerpts, no reasonable man acting carefully can convict on such evidence.

PW2's demeanor on the stand was unimpressive. He was shifty and uncomfortable. I

accordingly reject his evidence as it would unsafe to rely upon it (Furthermore, such

confession would only operate against A1 and not A3).

PW3 was Mageba Mabhanya Mabuza, who is PW1's son from a previous marriage. He set out in detail how A2 and A5 came and requested the deceased to go with him to Church. He further stated his role in reporting the deceased's disappearance and where and how he found the deceased.

8

1 consider this witness to have been very truthful and stood up well under cross-examination. The only portion of his evidence that I find unsatisfactory was with regard to the relationship between A1 and the deceased. In his evidence in chief, he stated that he did not know what the relationship was like. In cross-examination, he changed his story and said that A1 and the deceased quarreled and were not in good terms.

He said he did not know of the cause of the quarrel but he was informed by the deceased and other family members of the quarrel. When asked why he did not tell the Court his version had changed, he

attributed this to an allegation that he had not understood the question clearly. It is significant that the hearing was adjourned for the day after PW4 had given his evidence in chief. The change of his story in cross-examination suggests that he was reminded to mention that the relationship was not good between AI and the deceased. For that reason, I will not accept this portion of his evidence. It must always be borne in mind that the trial Court is at large, while rejecting one portion of the sworn testimony of a witness to accept another portion -See R v KHUMALO 1916 AD 480 at 484. See also S V OOSTHUIZEN 1982 (3) SA 571 at 577.

The Crown then called Abraham Gazathi Methula (PW5), who stated that he was arrested and detained at Gege Police Station on a charge of stock theft. He was arrested on the 13th April 1998 and stated that he knew all the accused persons as they were detained in the same Police Station and they attended remand hearings together.

In relation to AI, PW5 stated that AI informed him of his involvement in the death of the deceased, namely that AI wrote a letter to the other accused persons calling upon them to return home to kill the deceased as he was causing AI lots of trouble over land and cattle. The other accused persons arrived, killed the deceased and were given money by AI to return to South Africa.

AI then requested PW5 to go to A1's home and kill PW3 in order to destroy all available witnesses. AI further told him to go to AI's daughter-in-law by the surname of Malinga, where he would find a gun for killing PW3.

9

I have great difficulty in accepting this witness' evidence for reasons that follow below. Firstly, there is a material contradiction between his evidence and that of the Police Officers PW 11 3558 Detective Constable Walter Muzi Jele regarding a remand hearing on the 24th April, 1998 at the Nhlanguano Magistrate's Court. Whilst PW11 says they were in Nhlanguano for about an hour, having arrived at 12.45, PW5 says they were there for more than three hours which presumably gave him an opportunity to speak to the accused persons and to obtain details about their involvement in Thubesi's death. PW12 on the other says they were in Nhlanguano at or about 11h00 and found that the Court was in session and only took the accused for remand at or about 14h30. This witness said they waited for their vehicle which was taken for repairs at the Central Transport Administration, Nhlanguano.

These I view as serious inconsistencies in their evidence, in relation to the accused's opportunity to discuss with PW5. Secondly, PW12 stated that PW5 was inside Court during the remand hearings, whilst PW5 maintained that he was outside.

There is also an inconsistency between the evidence of PW2 and PW4. PW2 said AI told him that he had given money to Dee Dladla to return to South Africa, whereas PW4 said AI said he had given money to A3, A4 and A5 to escape to South Africa after the deceased's death.

Furthermore, the only dispute led in evidence between AI and PW1 was over land. PW4 said he was informed that the deceased was troubling AI over land and cattle. This issue relating to cattle I reject as falsehood because it was not even suggested to the crown witnesses in cross-examination.

Further, PW5 stated that he was meeting AI for the first time at Nhlanguano. It would be unusual for AI and A3 and A4 to tell him their story having met for the first time on that day.

Another portion of the Crown evidence that I am compelled to reject is with regard to the assault of AI by the Police Officers Messrs Magongo, Jele and the other members of the investigating team. In cross-examination by Mr. Magagula, all the Police Officers vigorously denied ever assaulting AI during interrogation. Mr. Magagula

10

put it to Officers Magongo and Jele that AI, due to the assault, lodged a complaint to the presiding Magistrate during a remand hearing and the Magistrate ordered that AI be taken for medical attention.

The Crown, on its own volition applied to produce the record of proceedings from the Subordinate Court. The Defence did not object thereto. The record was marked Exhibit D. From the record, it

appears that on the 5th May 1998, A1 lodged the complaint and the record reflects as follows:-

"Accused 4 (A1 before this Court) states that he was assaulted by the Gege Police as a result he is not feeling well and he cannot hear properly. He states that he needs medical attention.

"Court orders the correctional services to take Accused 4 to a doctor for medical examination and treatment".

The Court record submitted by the Crown which controverts the evidence of the Police Officers in relation to A1 has inflicted a gaping wound to the credibility of the Police Officers respecting the assault of A1, which they vigorously and unequivocally denied. This episode clearly weakens the ailing evidence against A1.

In view of the foregoing, it is my considered view that the evidence adduced by the Crown in support of Count 1 does not meet the requirements of Section 174 (4), in so far as A1 is concerned. I therefore find that there is no evidence on which a reasonable man, acting carefully might convict. I accordingly acquit and discharge A1 on the first count.

In relation to Count 2, the Crown adduced the evidence of 3624 Detective Constable Siphon Mtsetfwa. His evidence was that on the 5th December, 1997, he received a report to the effect that A1 had in his possession an unlicensed firearm. Acting on that report, he, in the company of Constable Sacolo proceeded to A1's home at Mashobeni, where they found the deceased outside his home next to the kraal. He was alone.

11

Officer Mtsetfwa introduced himself and Sacolo as police officers from Gege Police Station and requested permission from A1 to search the huts. A1 agreed. Officer Mtsetfwa then searched the hut in which the accused said he slept. He noticed something like the butt of a gun under the bed. He then shifted the bed to the side and saw the gun, a 303 rifle, bearing serial number ERA564751. Accused 1 was requested to produce a licence to no avail.

Officer Mtsetfwa then proceeded to inform the accused that he was investigating the illegal possession of a firearm and duly cautioned A1 in terms of the Judge's Rules. He took the firearm to the Police Station and charged the accused accordingly.

I have no hesitation in accepting D/Constable Mthethwa's evidence. He was clear and gave his evidence in a satisfactory manner and stood his ground under cross-examination. He struck me as a bright young police officer, who with further training and exposure, has a glittering future in the force, I commend him.

The only aspect pointed out by the Defence attorney about his evidence was that in his evidence in Chief he never mentioned that there was a shooting incident before they proceeded to A1's house. This was elicited through cross-examination. I however do not find this attack justified as people regard incidents differently - one may regard an incident as insignificant and another as significant. He explained the incident in a satisfactory manner and I cannot fault him on this. Though Officer Sacolo was not called to corroborate Officer Mthethwa's evidence, I regard Mthethwa's evidence as credible and reliable, even in the absence of corroboration. I accordingly find that there is evidence on which a reasonable man acting carefully may convict A1 in respect of count 2. I therefore order that A1 be put to his defence in relation to this Count.

Accused No. 4 (VUSI GEBHU MALINGA)

This accused person is A1's nephew. I have already stated PW1's account of A4's involvement in confrontation of PW1 and the deceased, where A4 accompanied A1. From that evidence, it is not suggested that A4 did anything unlawful to either the

12

deceased or to PW1, PW1's evidence does not in anyway implicate A4, The only connection with A4 was that the disputed land was to be given to A4's mother.

In point of fact, in her examination, in chief, the following was the discourse between Mr. Wachira and PW1:

Q: How was the relationship between you and A4 before the confrontation A: I was in good terms with him because they were all my children

Q: How was the relationship between you and A4's mother A: It was good

From the foregoing, I do not find that there is any evidence that A4 participated in the killing nor has it be shown that he had a motive to kill the deceased.

The next piece of evidence linking A4 is that of PW4, Abraham Gazathi Methula. I have stated the reasons why I will not accept his evidence in relation to A1. Those reasons apply with equal force and I will not repeat the contents thereof.

Evidence, which in my finding links A4 to the commission of the offence is the that of PW13 Sub-Inspector Norman Magongo, whose evidence is to the effect that during the interrogations, A3 said he had seen the deceased on the 15th March 1998 and that he was in A4's company and the deceased was in the company of A2 and A5. This A4 allegedly admitted.

During Sub-Inspector Magongo's further interrogation, he alleges that A4 freely and voluntarily took Inspector Magongo to A4's home on the 18th April 1998, where he gave Inspector Magongo a knobstick, Exhibit 7. On the same day, he took Sub-Inspector Magongo to Mkhitsini area to a certain shop where A4 told his wife Peter Maseko to hand him a knife. This knife Exhibit 8 was handed to Sub-Inspector Magongo by A4.

12

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13

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14

It is therefore my considered view that A2 should also come to his defence and state his own side of the story, particularly because he carried a knob-kerrie and was one of the last persons to be seen with the deceased whilst the deceased was alive.

Accused 3

This accused person is A1's son from another wife, namely Lomgcibelo, Evidence linking him to this offence was adduced by PW2 and PW4, respectively. For reasons set out elsewhere, I will not rely on that evidence as it is not convincing and is unreliable.

PW9, A3's girlfriend gave evidence to the following effect: that on the 15th March 1998, A3 was at home from early morning and only left in the late afternoon to visit A1's home. He did not return until around midnight.

On his return, PW9 was already lying in the bed falling asleep. She however woke up and dished some food for him. A3 was in the company of A2 and A5. A3 requested PW9 to pack his clothes, a green trouser, striped T-shirt with a green collar and his toiletry, which she did.

A3 told PW9 that he was leaving. On enquiring as to why A3 was leaving suddenly, he answered by saying that he had told PW9 that he leaves at any time and time had come for him to leave early that morning. He took his bag and stood at the door and to said to PW9 that if people enquire regarding his departure, she should say that he left on the 14th March 1998. All this time, A2 and A5 were outside the hut. He also told PW9 to take his firearm and give it to A1 the following morning for safe-keeping.

Indeed the following morning she proceeded to A1's house and found A1 lying on a rock. She told A1 about the gun and A1 said he would come to fetch it. She then asked A1 what had happened to A3 as he (A3) appeared worried when he left and to which A1 answered by saying that that was A3's normal behaviour and that A3 left at any time.

PW9 stated that A3 departed at around 11h00 in the company of A2 and A5 and she never saw him again until she heard that he had been arrested in connection with the deceased's death.

In the battle of wits that ensued in cross-examination, Mr. Magagula suggested that she was fabricating evidence against A3 because he had refused to travel to South Africa with her which she denied. She maintained her story and her cool while closely cross-examined by Mr. Magagula. I accordingly have no hesitation in stating that she gave a truthful and credible account of what she knew and her evidence cannot be faulted.

Her evidence clearly suggests that A3 knew about the deceased's disappearance. This is evident from A3's sudden departure and the instruction that she should lie about the date of his departure.

From the evidence of Sub-Inspector Magongo, A3 admitted to having seen the deceased on the day of his disappearance and that he was in A4's company. Inspector Magongo further said A3 and AI pointed out an axe, presumably used in killing the deceased. However, the Pathologist's report excluded as unlikely that an axe was used to inflict the injuries regard being had to the fact that there were no fractures to parts like ribs. He suggested that a sharp instrument like a knife was likely to have been used to inflict the injuries on the deceased.

From the foregoing, I am of the considered view that A3 should also be put to his defence. I accordingly refuse the application in terms of Section 174 (4) in so far as it relates to him.

In the result, the application is granted only in respect of AI regarding Count 1. He must conduct his defence, in respect of Count 2. The application in respect of the other accused persons is refused. They must likewise be put to their defence and it is so ordered,

T. S. MASUKU

ACTING JUDGE