

IN THE HIGH COURT OF SWAZILAND

CASE NO.114/98

IN THE MATTER BETWEEN:

REX

VS

JOSEPH PHANGANO MAMBA

WALTER HLEHLA MAMBA

THOMAS MAJUBA NHLEKO

NDUKU DOCTOR MAMBA

CORAM:

MASUKU J.

FOR THE CROWN:

MR J.W. MASEKO

FOR ACCUSED 1 AND 4:

MR A. M. LUKHELE

FOR ACCUSED 2 AND 3:

MR B.J. SIMELANE

JUDGEMENT

7/02/2000

(i) CHARGE.

The accused persons stand before me charged with the crime of murder. The indictment alleges that upon or about the 11th February 1998, and at Letindze area in the Lubombo District, the said accused persons, acting in common purpose did unlawfully and intentionally kill Mfaneni Dlamini (hereinafter referred to as "the deceased") by assaulting him with sticks, stones and submerging his head in the water until he died.

Initially, there were five accused persons, who included one Shona Wilson Mamba, who was reported to have died in custody whilst still awaiting trial. The said Shona Wilson Mamba featured as Accused 4. There is in the circumstances no need to make any further reference to him at this stage.

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(ii) CHRONICLE OF CROWN'S EVIDENCE.

The first Crown's witness was Mirriam Thuli Dlamini (PW1) who was the deceased's wife. They resided at Letindze area. She stated that she has six children who were attending school but who had dropped off from school due to financial constraints occasioned by the demise of their father.

Regarding the deceased's death, PW 1 stated that on Wednesday, 11th February 1998, she woke up in the morning and helped the deceased drive the cattle to the dipping tank. She was driving the goats.

When they reached Mamba's grocery, the deceased told her to return home to attend to her daily family chores. When she arrived at home, she took a hoe and went to weed the fields. When she returned from the fields, she enquired from a child who had gone with the deceased of his whereabouts and she was

advised that he had gone to the home of Bhutana Dlamini who resides next to Phophonyane dip tank.

By the end of the following day, the deceased had not returned. On Thursday, 12th February, 1998, according to PW 1, the deceased had to travel to Lubulini and she thought he had not returned home because he decided to sleep somewhere closer to Lubulini. On Friday the 13th February 1998, PW 1 woke up and went to Bhutana's home to enquire about the deceased's whereabouts. Bhutana confirmed that the deceased had been to his home on the 11th. He was in the company of one Thomas, Silwane Ngwenya and Simon Gamedze. Bhutana further informed PW1 that the deceased left with his aforesaid companions.

She then proceeded to Gamedze's home but there was no one present. She later proceeded to Thomas Ngwenya's home where she found both Ngwenya and Silwane, who informed her that they left the deceased in the company of Simon Gamedze. Seeing that the deceased's whereabouts could still not be located, PW 1 decided to report to Lubulini Police Station that her husband left for the dipping tank on the 11th February, 1998 and never returned home and that her diligent efforts to trace him had been rendered fruitless.

PW 1 stated further that on the day of his disappearance, the deceased was wearing black school shoes, carried a small knobstick, a bush-knife, whose handle was made of a car tyre.

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He also wore a black trouser with small white spots. On his upper body, he wore an old beige skipper, and a greenish waistcoat with silk material on the back.

The Lubulini Police then took PW 1 back home, where she found her sister-in-law, to whom she related the story regarding the deceased's disappearance. On the following Sunday, the residents in the community convened a meeting and commissioned a search party to conduct a search for the deceased. The deceased's corpse was found and certain items which were carried by the deceased were shown to PW 1 namely, a bush-knife, a knobstick and a left shoe.

About the relationship between the deceased and the accused persons, PW 1 stated that they were not in good terms but were just ordinary people. PW 1 proceeded to say that the relationship between Accused 1 and the deceased was not good because they were quarrelling over a woman teacher at kaNkojwa and that this was over a number of years.

In cross examination by Mr Lukhele, PW 1 stated that at some stage Accused 1 borrowed a sail and he once helped PW 1 by conveying her to Sithobelweni Clinic. She was sick on that occasion. PW 1 proceeded to state that this good relationship did not obtain until her husband's death as suggested by Mr Lukhele. She stated that at the time of the deceased's death the relationship was no longer good. PW 1 further stated that she was unaware of any quarrel between Accused 1 and the deceased in 1998.

PW 2 was Mshishi Samson Magagula, who is the Chief's runner at KaNkonjwa. He stated that on the 15th February 1998 the Police came to report the disappearance of the deceased. The Police further asked PW 2 to commission a search party, which was done on a Sunday. It was PW 2's evidence that they preceded towards the Mhlatuze River, which they crossed. He then went into a bush and there he discovered the deceased's corpse. He then called the rest of the members of the search party.

According to PW 2, the deceased's body was swollen, smelly and was beginning to decompose. PW 2 then went with Isaiah Hlanze the Chairman of Libandla to report that the deceased's body had been found to the Police. The Police came and took the deceased's corpse with them.

PW 2 stated that he was unable to see the colour of the deceased's trouser's because the deceased was wet at the waist and was becoming putrid. The colour of the shoe found on the

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deceased was maroonish in colour, continued PW 2. PW 2 further recognised a shoe and a knobstick in Court as having been found at the scene where the deceased's body was.

In cross-examination, PW 2 was asked if there were any signs of injuries on the deceased's body and his response was negative. That was the extent of his testimony.

PW 3 was Robert Mciniseli Dlamini, who stated that he was invited by the Police in his capacity as Chief's runner to accompany them to the accused persons' homes for the purpose of collecting some knobsticks. Those present were Accused 2,3 and 4. According to PW 3, they first went to Accused 1 's home, took some knobsticks there and they proceeded in turn to Accused 2's home, Accused 3's home and lastly to Shona Mamba's home.

This witness stated that he could not recall the types of sticks which were recovered from the homes of each of the accused persons. Furthermore, he could not say who pointed out what items amongst the accused persons as he was merely following the Police.

In cross-examination, Mr Simelane asked this witness what his role in the pointing out session was.

PW 3 stated that he played no role. He was just requested to accompany the Police and the accused as he was a venerable member of the community. This witness also confirmed that after recovery of the various items from the accused person's various homesteads, the items recovered were shown to him but he could not recall what they were. PW 3 further stated that he would remain outside the huts with the Police who would instruct the accused to return with whatever items were necessary.

PW 4 was Simon Hlekwako Gamedze, a farmer of KaNkonjwa, under Chief Maja. According to this witness, on the 11th February, 1998 he went to the dip tank. On his way back, and in the company of two Ngwenyas, he met the deceased who requested the witness to wait for him. PW 3 refused because he had to attend to some talks at his home. PW 3 then proceeded to Bhutana Dlamini's homestead to offer condolences to him and that is where the deceased found them.

After offering the condolences, the men left together and strangely, the deceased went past his home and he crossed the river with PW 4. At the river, they found some people, Fana and Maswane Mamba, making cement blocks and they conversed with them and proceeded to

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their homes. The witness and the deceased went into the witness' field to look for some watermelons.

They found the watermelons and ate them with the deceased. After having eaten to their full, the deceased offered to sell some boots to PW 4 for E20,00.00 and the arrangement was for the deceased to deliver these at PW 4's home through a child but this did not happen.

Later that week, PW 4 was informed by Bhutana and Mkhumane that the deceased's had disappeared. PW 4 was on his way to Phongola and on his return that day (Friday), PW 4 and the two Ngwenyas went to the deceased's homestead but found nobody there. On Saturday, the Police came to question PW 4 about the deceased's whereabouts and he told them that when he parted with the deceased, the deceased was to return to his home. The Police told PW 4 to go and look for the deceased but he refused to do so because the deceased belonged to another Chiefdom and no alarm regarding his disappearance had been raised in his area.

On the Sunday, an alarm was raised and to which PW 4 responded. A search party was commissioned to search for the deceased. At the river, the deceased was found without much difficulty. PW 4 described the clothes worn by the deceased as a yellow short-sleeved t-shirt, a greenish waistcoat, a black but fast fading pair of black/grey trousers and black shoes. PW 4 identified a shoe, the bushknife and a knobstick as belonging to the deceased and which the accused was carrying on the fateful Wednesday.

In cross-examination, PW 4 was asked if he noticed any injuries on the deceased body and he stated that he did not go close to where the corpse lay. He stood about ten metres away from it because he was saddened and pained by the whole episode. There were no questions posed in re-examination.

The Court asked PW 4 to describe the area where the deceased's corpse was found and the witness stated that the body was found in a sandy forest under some bushes. It was found uncovered and it was not easy to see the corpse because the place was bushy. According to the witness, the corpse was found more than ten metres from the crossing point.

PW 5 was Khululekile Nomvula Dlamini one of the Crown's key witness. Her evidence was that she is eighteen years old and was living at KaNkonjwa area with her boy friend one

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Shona Mamba who died. She had not been married to Shona and, from that relationship was born one child. She stated that after some time she left KaNkonjwa area to ask for toiletry from her mother as Shona had been arrested for the deceased's death.

According to PW 5, the deceased died next to the Mhlatuze River on a Wednesday. He first crossed the river and he greeted PW 5 who was with LaNyawo. On his return, as he was walking from the direction of Ngwenya's homestead, he appeared running and was hotly pursued by some five people.

When he reached the river, the deceased stopped and started fighting his assailants, the accused persons together with Shona Mamba.

As the deceased was fighting with his assailants, Shona Mamba hit the deceased with a stone on the chest and the deceased fell into the river. His assailants then submerged his head under the water for a short while after which he died and could not fight back. According to PW 5, the accused persons carried an assortment of items. Shona carried a knobstick and a spear, Accused 2 carried a knobstick and a straight stick. The others also carried some sticks but she did not see exactly what they were carrying. She further stated that she could not identify the items carried by Shona and Accused 2 amongst the knobsticks exhibited in Court.

The witness further stated that this incident occurred at around 14h00 and that immediately after the deceased was submerged and was dead, she and her companion laNyawo, proceeded for a church choir practice session. Later that afternoon, at around 17h00 she saw all the accused persons at Shona's homestead, including Shona. They were sitting next to the cattle byre but she did not hear what they were discussing. This witness further said she knew all the accused persons before Court well and proceeded to identify them in order as they sat in the dock.

In cross-examination, Mr Lukhele asked PW 5 when she started living in KaNkonjwa area and she stated that it was in October, 1998 and that she lived there for about three months. Although she could not recall well, she left the place in March, 1998. She later conceded that if she started living there in October, 1998 she must have left the area sometime in 1999.

She further stated that the day on which incident above described occurred was the 11th, a Wednesday, in 1998 the month of which she could not recall. Later, she stated that the

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month was February. She conceded discussing the date when this event occurred but denied discussing what her evidence in Court was to be. She denied having been told what to say in Court.

The witness stated that she went to the river with laNyawo to bathe and were there for about three quarters of an hour. They had arrived at the river at approximately 14h00 and left at around 14h30. It was

put to PW 5 by Mr Lukhele that she could not see the deceased coming from Ngwenya's homestead and she agreed. The witness further described the items of clothing worn by the deceased but stated that he wore a black waistcoat and carried a bush knife and knobstick on his hands.

In cross-examination, PW 5 stated that the deceased crossed the river and came back running and he was raising an alarm. She said on hearing the alarm, she went to tell Mr Ngcunda Mamba about the attack on the deceased. This she did before she went for choir practice. Mr Lukhele accused the witness of making up the story relating to making a report to Ngcunda Mamba, regard being had to the fact that she never mentioned it in chief. PW 5 responded by stating that she never mentioned this because the questions posed to her by the Prosecution did not relate to that issue. She however stressed that she did make a report to the said Ngcunda Mamba.

When asked what Accused 1 was wearing on the fateful day, PW 5 said that she did not see and was therefor unable to tell the Court about any item of clothing worn by Accused 1. PW 5 confirmed that Accused 1 carried something on his hand but said that she could not precisely see what it was. She also failed to tell what clothes Accused 4 wore and also could not tell what Accused 4 was carrying. Mr Lukhele asked PW 5 why she could not see what the Accused 1 and 4 were wearing as according to her evidence, the whole incident occurred during the day.

In response, PW 5 stated that she never took notice of the clothes worn by the aforesaid accused persons because her attention was not focussed on their clothes. She further conceded under cross-examination that as the deceased and the accused persons were fighting, there was a lot of confusion and she became afraid. It was put to PW5 that the accused persons never attacked the deceased because if it was so, PW 5 and LaNyawo

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would have intervened and helped the deceased. PW 5 stated that she did offer assistance to the deceased by reporting the whole episode to Ngcunda Mamba.

It was put to PW 5 that she must have had difficulty continuing with the practice session having recently witnessed a death and PW 5 stated that she told herself that she did not kill the deceased and also did not want to be distracted in what she was doing by what she had witnessed. It was further put to PW 5 that she must have felt guilty for not assisting the deceased. PW 5 stated there was nothing she could do because there were many assailants involved in attacking the deceased.

Mr Lukhele asked if PW 5 saw any of the accused using the sticks that they carried to assault the deceased and PW 5 said that she only saw Shona Mamba assaulting the deceased, using a knobstick. She further stated that the deceased was hit so hard that he must have been injured in the rib area where the blow landed. PW 5 stated that she was surprised that the post - mortem report did not record any injuries being found on the deceased's corpse. It was then put to PW 5 that what she had said was untrue in the light of the post - mortem report but PW 5 maintained that she had told the Court the truth.

It was further revealed in cross-examination by PW 5 that when she told Ngcunda that the deceased had died, he told her not to mention the issue to anyone and he did not even go to the scene to observe what had happened to the deceased. It was put to PW 5 that had she informed Ngcunda as alleged, he would have done something like reporting to the Chief or the Police. PW 5 maintained her story.

PW 5 was asked who else she told about the deceased's death and she said that she told her mother-in-law, who told her that Ngcunda had already informed her of the deceased's death. She confirmed that she did not report the matter to the Police because there are no Policemen in the area and she further did not report the incident to the Chief's runner because she had not met him before.

PW 5 was asked if she told the Police what she knew when they eventually got information about the deceased's death and she answered in the negative, stating that a child had already informed the Police. She stated that she did not have an opportunity to talk to the Police.

Mr Lukhele put it to PW 5 that had she witnessed the deceased's death as alleged, she would have told other people in addition to Ngcunda and her mother-in-law. PW 5's response was that she was a new comer in the area and she reported the matter to people whom she knew and could be expected to report to.

Regarding her questioning by the Police, PW3 stated that she met the Police on two separate occasions, preferring not to disclose everything on the first occasion. It was put to her that she told half-truths to the Police on the first occasion and she agreed. She stated that what she did not disclose to the Police on the first occasion were the names of the persons who were attacking the deceased. She had told the Police that immediately when she saw those people she ran away. When asked why she did not tell the Police the whole truth on the first occasion, PW 5 said that it was because her mother-in-law told her that the accused persons had threatened to kill her (PW 5) if she told the Police that they (accused) were involved.

It was further put to PW 5 that Accused 1 was not at the river as alleged but went to the dipping tank and thereafter proceeded to Manzini at Fairview where he returned the following day. PW 5 insisted that she saw Accused 1 at the river. Mr Lukhele further put to PW 4 that Accused 4 was not at the river as alleged by PW 5 but that he was at the borehole site digging with the males of the area.

Again, PW 5 denied this, insisting that Accused 4 was at the river and that she saw him. She further mentioned that the digging of the borehole only took place during the morning hours.

PW 5 further confirmed seeing the accused persons later in the afternoon of the same day next to the kraal at Shona's home. She further confirmed that apart from Shona, she never confronted the accused persons about why they killed the deceased. When it was put to PW 5 that Accused 1 could not have been there because he had gone to Manzini, PW 5 insisted that she saw Accused 1 with the other accused at Shona's home.

PW 5 was further subjected to cross-examination by Mr Simelane, where it emerged that PW 5 went to school as far as standard five. She was asked as to when her boyfriend, Shona Mamba's funeral was conducted and she stated that she did not recall. Mr Simelane put it to her that it was strange that she remembered incidents which occurred on the 11th February, 1998, but failed to recall incidents which occurred later i.e. Shona's death. She confirmed that she could not remember the later events.

She however denied when put to her that the

date 11th February, 1998, was suggested to her, stating that she knew it and even recalled the weather on the date in question.

It also transpired from the cross-examination that PW 5 and LaNyawo undressed and proceeded to bathe themselves in the river. PW 5 stated that their backs were obscured but their front was in the open. It was put to her that normally naked people tend to hide their front rather than their back, to which she agreed. When asked if they were exhibiting their private parts to the public, PW 5 agreed stating that they intended to get up and dress fast as they were able to see approaching people before the latter could see them.

Mr Simelane further put it to PW 5 that she was not able to see whether the deceased was dead because of the commotion and the distance, which she confirmed was 30 - 40 metres away. PW 5 insisted that she saw that the deceased was dead. PW 5 conceded that if she told the Police what she saw, her lover would have been arrested.

PW 5 also stated that she confronted Shona about killing the deceased but he did not respond. PW 5 confirmed under cross - examination that she did not see what Accused 2 and 3 were wearing on that day. She stated that she was wearing a headscarf and a pinafore and that LaNyawo was similarly dressed. She could not recall what Ngcunda was wearing. When asked why she remembered what the deceased was wearing but could not remember what any of the accused wore, PW 5 stated that it is because the deceased passed next to her. It was put to PW 5 that the reason why she stated what the deceased wore was because she had been told but she denied this.

It was put to PW 5 that Accused 2 never went to Shona's home in the afternoon of the 11th February, 1998 and it was further put to her that Accused 2 never went to Mhlatuze River around 14h30 on the same date. PW 5 denied these allegations, stating that she saw him in both places. She denied as false the suggestion that in the afternoon of the same date Accused 2 was repairing the cattle byre for calves. She further denied that Accused 3 was out in the fields herding cattle on the afternoon of the 11th as put to her by Mr Simelane. She insisted that Accused 3 was at home that afternoon. She further denied suggestions by Mr Simelane that Accused 3 was not at the river at 14h30. She insisted that she saw him at the river and confirmed seeing him at Shona's homestead in the late afternoon of that date.

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The next witness was Bhutana Timothy Dlamini (PW6), who introduced himself as a resident of Phophonyane in KaNkonjwa/Letindze area. He confirmed that on the 11th February, 1998 the deceased, Ngwenya and Gamedze came to his home to visit him as he had been involved in a motor vehicle accident and was therefor unwell. He further testified that he saw accused 1 driving cattle to the dip tank at around 8h00 on the same date. In the afternoon, at around 16h00, he again offered a lift to Accused 1 and dropped him at the bus stop where Accused 2 was to board a bus presumed to be going to Manzini because that was the time at which Inawe Bus Service to Manzini passes by.

PW 6 stated that he did not discuss anything with Accused 1 before dropping him off at the bus stop.

It was PW 6's further evidence that the following day i.e. 12th February, 1998, he again offered a lift to Accused 1 when he found him at Maloma. In the vehicle, they talked about PW 6 being locked in his car boot by robbers, which prompted Accused 1 to say that if the witness would find the robbers, he would have to avenge himself as he, Accused 1 had also revenged. The witness did not wish to say anything after this. Being probed further by Mr Maseko, PW 6 indicated that Accused 1 did not tell him on whom he had revenged and when he had done so.

In cross-examination, it was put to the witness that he did not have a watch and could only give an approximate time of the day by looking at the sun. PW 6 agreed. He further stated that he used the buses to estimate the time i.e. certain buses drive past at certain times and approximates the time there from. It was put to PW 6 that he gave a lift to Accused 1 between 13h00 and 14h00 and PW 6 stated that he had no watch and could agree that it was so.

In re-examination, PW 6 confirmed that he gave a lift to Accused 1 around 16h00. He further confirmed that when he offered Accused 1 a lift, the Lekelela bus that drives past at 15h00 had already passed. The Court asked a few questions from the witness. He stated that he gave a lift to Accused 1 at around 11h00 on the 12th February. Furthermore, they did not talk about where Accused 2 was coming from.

The next witness was Fana Mamba, PW 7, who is a relative of all the accused persons. It was his evidence that on the 11th February, he was at the Mhlatuze River, making some cement blocks with Maswane Mamba. The deceased, who was from the dipping tank passed

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him there. He crossed the river in the company of three other men. He greeted them and went up an incline next to the river. The deceased then came back running and was being chased by certain people some of whom he saw. He said he did not see the others because he also started to run away. Those he

was able to recognise were Accused 2, 3 and 4.

It was PW 7's further evidence that the deceased were carrying and lifting up sticks as they chased the deceased. The witness was quick to point out that due to the distance between him and where the deceased and his assailants were, he was unable to recognise the sticks carried by the deceased's assailants. PW 7 further stated that he did not see what became of the deceased as he started running away whilst his assailants were pursuing the deceased and PW 7 attributed his fleeing to fear.

It was his further testimony that although he did not have a watch, this episode occurred before 13h00. This witness also confirmed having seen PW 7 and LaNyawo at the river although they were some distance away next to another crossing point. According to his evidence, PW 5 and LaNyawo, on arrival at the river passed where the witness and his companion were and proceeded to the other crossing point. The witness was unable to state whether PW 5 saw the incident involving the deceased's death as he ran away to his home and where there was at the time no one present.

In cross-examination, it was put to PW 7 that he did not see incident clearly because it was far and he agreed. He further confirmed that he could see only three of the assailants and further confirmed that he could not see the clothes the assailants were wearing because of the distance. When asked whether he was able to see what was going on at the scene of the attack because of the commotion, PW 7 stated he saw the assailants lifting up their sticks but never actually saw whether or not the assailants managed to assault the deceased using the sticks.

The witness proceeded to state that Maswane also ran away from the scene because of fear. It was the witness' further evidence that he did not tell anyone about the incident even after hearing that a search party had been commissioned to find the deceased.

When cross-examined by Mr Simelane, PW 7 stated that the deceased passed at the crossing point which was about 3-5 metres away. He stated further that PW 5 and LaNyawo were

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nowhere in sight. He further confirmed that he could not identify the sticks carried by the deceased's assailants together with clothes which they wore because of the distance. It was put to the witness that he was mistaken when he said that he saw the Accused 2 and 3.

When asked how long the chase lasted before he started running away, PW 5 stated that it was less than a minute. It was then put to him that that time was too short for him to recognise the deceased's assailants but PW 5 said that he saw them because they came out of the bushes. It was further put to him that because he was afraid, and that made his recognition of the assailants even more difficult and the witness agreed, stating that he did not see properly because of the trees. The witness proceeded to state that he did not report the episode to anyone, including his parents and did not even enquire as to what may have eventually happened to the deceased because of fear.

Finally, Mr Simelane put to PW 7 that the reason why he did not report the episode or even make enquiries about the deceased's condition was because he did not see Accused 2 and 3 and that it was also because PW 7 was lying. PW 7 insisted that that he saw Accused 2 and 3 is true and it happened during the day. In re-examination, the witness confirmed that he knew the accused persons well as they are from his area.

PW 8 was 2278 D/Sgt. Alphabet Mkhabela, the Investigating Officer who stated that he received a report from PW 1 regarding the deceased's disappearance on the 14th February, 1998. On receipt of the report, the witness proceeded to Letindze area and informed the deceased's Indvuna of the disappearance of the deceased. He further caused an instruction to be given for the commissioning of a search party to look for the deceased on the 15th February, 1998.

It was his evidence that the deceased's corpse was found next to Mhlatuze River and he identified the



deceased's body because he knew the deceased well during his lifetime. The deceased's body was at an advanced stage of decomposition and it was then conveyed to Sithobeleni Mortuary. The witness further testified that on the 23rd February, 1998, he arrested Hlehla Mamba and cautioned him in accordance with the Judges' Rules.

On the 24th February, 1998, he arrested four further suspects and also cautioned these in accordance with the Judges' Rules. These were Phangani, Shona, Nduku Mamba and

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Majuba Nhleko. These were arrested at their respective homesteads. After the caution, all the accused made statements and they also produced sticks which were collected from their respective homesteads and these were recorded and kept as exhibits. It was this Officer's evidence that the exhibits were produced by the Accused persons freely and voluntarily and this was done in the presence of the Chief's runner. He further testified that there was no inducement given to cause the accused persons to produce the sticks. The officer then handed in an assortment of sticks knobsticks and an axe which were marked Exhibit 1, 2, 3, 4, 5, 6 and 7, respectively.

In cross-examination by Mr Lukhele, the witness conceded that there were no visible injuries on any part of the deceased's body. He further confirmed that he observed no indications on the deceased's body that he had been assaulted. He further confirmed that had the deceased been assaulted with any of the exhibits then there would be some injuries visible on his body. The witness further stated that the Accused 1 did not point out any exhibit.

Mr Simelane, in cross-examination put to PW 8 that the Police knew what items they were going to collect as exhibits because PW 3 had stated that he had been told by the Police that they were going to collect sticks from the accused persons' homesteads. This PW 8 denied, stating that PW 3 may have said so because he knew that sticks were eventually recovered. It was further put to PW 8 that the caution which he administered to the accused persons before the pointing out of the sticks only related to evidence in writing but did not include the production of exhibits. PW 8 agreed.

The last Crown witness (PW 9) to be called was 2063 Asst/Supt Aaron Thabo Mavuso. What I consider to have been material evidence that he adduced related to recovery of a bush knife, which, according to his evidence was pointed out by Majuba Nhleko. According to PW 9's evidence the said Nhleko and his co-accused had been cautioned and interviewed by him and as a result, the accused persons led him to the Mhlatuze River, where the bush -knife was found hanging on branches of a tree. He further stated that all the accused demonstrated one by one what happened after being cautioned and this was captured by a video recorder which was however not played in Court.

Mr Simelane put it to PW 8 that Accused 2 and 3 denied that any caution was administered to his clients and this was denied by PW 8, insisting that the said accused persons were duly

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cautioned. It was further put to PW 8 that the bushknife was not found as a result of Accused 3 pointing it out but rather that it was found as a result of a joint search conducted by Accused and the Police. This was vehemently denied by PW 8. It was further put to PW 8 that each accused person was taken out of the vehicle into the bush to search for the bush knife but this was denied by PW 8, who stated that when the accused persons were let out one by one it was not for the purpose of searching for the bush knife. It was further denied that Accused 3 actually spotted the bush knife, it being alleged that it was actually the Police who spotted the same. This was vehemently denied by PW 8.

By consent between the parties, the post mortem report was handed in as part of the evidence and the need to call the Pathologist was thereby dispensed with. The said report was prepared by Dr R.M. Reddy, the Police Pathologist. According to the report, the examination was conducted on 16th February, 1998, and the body reflected signs of advanced decomposition, maggot crawling all over the body and in the

oval cavity and nose. The eyeballs had bulged and the tongue had protruded.

The post-mortem report further records that due to the signs of advanced decomposition, no evidence of ante-mortem injuries could be seen. At this juncture, the Crown closed its case and the Accused persons were put to their defence and they chose to give sworn testimony.

(iii) ANALYSIS OF THE CROWN'S EVIDENCE.

It is apposite for me to state at this juncture that the whole case for the Crown is predicated on the evidence of two witnesses, Khululekile Dlamini (PW 5) and Fana Mamba PW 7. The guilt or otherwise of the accused persons will hinge mainly on the reliability and credibility of their evidence. I will begin the analysis of the evidence by considering PW 5's evidence.

One thing that must be mentioned at the outset is that PW 5 is a young girl of 18 years and who was about 17 or even 16 when the incident occurred. Although her evidence was adduced largely in a truthful manner, there are some blemishes that I level against her testimony.

Firstly, according to her evidence, she clearly saw the deceased's assailant recognised them and identified them as the accused persons. In cross-examination, she was asked what the

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deceased's assailants were wearing and she was unable to mention even a single item of clothing worn by any of the accused persons. She said that she was not placing her attention on the clothes worn by the accused persons. Although she was not specifically asked, she did not even say what her own boy friend was wearing. I say this because there were answers that PW 5 gave although she had not been asked those questions.

It must also be borne in mind that according to PW 5, she did not see the accused persons once. In addition to seeing them during the fracas, she saw them again in the late afternoon under more tranquil circumstances. There again, she did not notice what the accused persons were wearing. One may understand that during the fight she was frightened and may not have had the opportunity to observe the accused's clothes. In contrast, she saw all the clothes which were worn by the deceased and described them as well as the other witnesses save the waistcoat. Whilst all the other witnesses stated that the deceased was wearing a green waistcoat, PW 5 said he wore a black waistcoat. This is a contradiction that was not explained.

Secondly, this witness appeared to me to be economic with the truth. What appeared strange to me, if her account is to be believed is that all the assaults that she saw were attributed to Shona, probably because he is dead and cannot deny. She said she saw Shona hitting the deceased with a boulder on his chest. He again hit the deceased with a knobstick on the ribs. Nothing specific was said about the role played by the other accused persons. For that reason, her evidence is suspect. Shona was also alleged by PW 5 to have carried a spear, which if true was not used on the deceased.

Thirdly, PW 5 stated that on the late afternoon of the deceased's death, she saw the accused persons assembled at Shona's home around 17h30. This was denied by all the accused persons. Of interest is that it was put to PW 5 that Accused 1 could not have been there as he travelled to Manzini earlier that afternoon. This PW 5 vehemently denied, insisting that she saw Accused 1 at Shona's home. This must be viewed against the backdrop of evidence adduced by PW 6 Bhutana Dlamini, who stated that on the afternoon of that day, he offered a lift to Accused 1 whom he assumed was going to Manzini. He again offered a lift to Accused 1 the following day at Maloma. For that reason, I accept the story by Accused 1 that he travelled to Manzini and could not have been at Shona's home. I do so particularly because his story finds corroboration in the Crown's own evidence.

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Fourthly, PW 5 lied before the Court when adducing her evidence. When cross-examined by Mr Lukhele, she conceded that she had discussed the matter that morning and specifically agreed that she also discussed the date when the accused was killed. However, in cross-examination by Mr Simelane, PW 5 turned around and completely denied ever discussing the issue with anyone that morning. Which is to be?

Another cause for concern relates to her positive statements that the deceased was assaulted and must have been injured by the assaults. PW 2 stated, when asked by the Court that he observed no injuries on the body of the deceased. According to his evidence, the accused's body was still intact but swollen and wet in the waist area. The fact that there were no visible injuries on the deceased's body is confirmed by the post-mortem report which however mentioned the advanced stage of decomposition as an impediment. This constitutes a difficulty in the Crown's case because there is no suggestion that the body was in such a state of decomposition that injuries could not be observed.

The one issue, which further obfuscates matters is that PW 5 stated that they were washing and had their backs covered but had their private parts exposed to the public crossing the river. This PW 5 said was to make it possible for them to see people approaching them from the front and to enable them to hide their private parts in time. She however said that the deceased called them even before they saw him. It is unusual for people to expose their private parts to the public but cover their behind and this raises suspicions regarding PW 5's evidence.

Furthermore, PW 5 agreed under cross-examination that there was commotion during the attack on the deceased. She further agreed that she became afraid and as a result of the fear, she ran away and proceeded to Ngcunda's home where she made the report. A doubt can in the circumstances persist as to whether it can be said for certain that the assailants were indeed the accused persons, particularly because according to her, they were about 40 metres away. In this regard, sight should not be lost of the fact that PW 5 did not notice any item of clothing worn by the accused. Furthermore, PW 5 did not confront any of the accused persons as to why they killed the deceased when she saw them in the late afternoon. The only one she said she asked was Shona, who did not reply. I also view adversely against PW 5 that she could not tell when her boyfriend died, which is an occasion that must have

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brought sadness to her and could not even tell when he was buried. In contrast, she remembered the date and events of the 11th February with devastating clarity although those had occurred earlier.

Regarding the evidence PW 7, it can also be attacked on the basis that PW 7 was also not forthcoming with the truth. He appeared to conceal certain information and the reason for this concealment is not difficult to find. It lies in the fact that he is related to all the accused persons and probably did not wish to give evidence which would constitute a millstone around their necks.

In his evidence, PW 7 said that he did not see Accused 1 amongst the deceased's assailant but he saw the other accused persons. He also states that he did not see what items each of the accused he saw was carrying. Furthermore, he did not have an opportunity to see what the deceased's assailants were wearing. This, PW 7 attributed to the distance and the fact that there were some bushes. Having conducted an inspection in loco of the place, the distance could not be an impediment to one seeing the clothes worn by any of the deceased's assailants. In this regard, PW 7 was not being truthful, probably due to the reason earlier mentioned.

Like PW 5, this witness stated that he became very frightened and because of the commotion, he did not even see whether the deceased was assaulted by his assailants. This was notwithstanding that he saw them chasing the deceased. In cross-examination by Mr Simelane, PW 7 stated that the chase by the accused he saw took less than a minute. He agreed that he did not see the deceased's assailants properly because of the trees. Can this evidence be, relied on in returning a verdict of guilty?

With regard to the evidence of the pointing out, I will not spend much time on it because the Crown's evidence failed to show the relevance of the sticks, knobsticks and axe to the case. The post-mortem

report did not confirm that there were injuries on the deceased's body as testified by PW 5.

Furthermore, none of the Crown witnesses stated what each of the accused was carrying as they attacked the deceased. Neither PW 5 nor PW 7 could. PW 8 only stated what he was told by the accused persons. The pointing out was in any event challenged by the defence on the grounds that the accused had not been properly warned of

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their rights before the said pointing out was carried out. The exhibits therefor do not have any bearing on the case regard being had to the evidence led.

(iv) CHRONICLE OF ACCUSED PERSONS CASES AND ANALYSIS THEREOF.

Accused 1, in his sworn testimony gave the defence of an alibi. He stated that on the morning in question, he woke up and took cattle to the dip tank. He was accompanied by Hlehla, Nduku, Shona and some two boys. On the way back from the dipping tank, he went to his brother's home where they were fixing a gearbox. Later, he went home, separated the cattle from the calves and drove the cattle to graze.

It is Accused 1's further testimony that he then went to his wives who were weeding tomatoes. He then asked LaSimelane, one of his wives to go and prepare his clothes as he intended travelling to Manzini. He went past the Hlanze homestead and then went home to wash and prepare to go to Manzini. After dressing he took liquor until the afternoon when he got a lift from Bhutana Dlamini who dropped him at the bus stop, where he boarded a bus to Manzini. In Manzini, he did not find a Mphinjana Khumalo of Fairview whom he had gone to visit. He then slept at a Ziyane homestead where the said Mphinjana stays. The following day, he went back home and got a lift from Bhutana at Maloma. He completely denied being involved in the deceased's killing. He admitted having a dispute with the deceased over a woman but said this was amicably resolved.

Accused 2, on the other hand stated that he went to the dip tank with Accused 1 and Accused 4. On return from the dip tank, he then asked Accused 4 to go to the borehole site as there was no one representing his family. Before that, he asked Accused 4 to hand him his axe which he, Accused 2 was to use in cutting logs to repair the calves' cattle byre. He then repaired the kraal until the late afternoon. He denied all the Crown's evidence linking him to the deceased's death.

Accused 3 also said that he went to the dip tank and on his return, he drove the cattle to the grazing camp. He then returned and stayed at home until the afternoon when he again went to the gate of the grazing camp to meet the cattle and brought them home. He then handed

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the cattle to the school children who had then returned from school to look after the cattle. He also denied the evidence linking him to the deceased's death.

Accused 4 also went to the dip tank according to his testimony. He went with Accused 2 and returned home at around 9h00. He then took the cattle to the mountain and on his return, he took his bicycle and went to the borehole site to dig the pit there. He returned home in late afternoon, around 17h00 and met Accused 2. He, like the others, denied having been at Mhlatuze River. He denied assaulting the deceased and also denied hiding the deceased in the forest.

All the accused were closely cross-examined by Mr Maseko. The defence then closed its case.

(v) CONCLUSION.

As mentioned earlier, the Crown's case depends entirely of PW 5 and PW 7, who were described by Mr Maseko as eyewitnesses. In the analysis of the Crown's case, I pointed out difficulties in their evidence

which renders their evidence in the respects mentioned less than convincing. For those reasons, I hold, although not without difficulty that they were not honest and reliable. A possibility of error exists in their identification of the accused persons, especially because there were a number of factors which militated against them, including fear, the distance from the scene, some bushes and of course the fact that they ran away from the scene and could not tell the Court what clothes the accused persons were wearing.

In *S v MEHLAPE* 1963 (2) SA (A) at page 32 A, Williamson J.A. stated as follows regarding the identifying witness:-

"...in a case involving the identification of a particular person in relation to a certain happening a Court should be satisfied not only that the identifying witness is honest, but also that his evidence is reliable in the sense that he had a proper opportunity in the circumstances of the case to carry out such observation as would be reasonably be required to ensure identification."

At page 32F, Williamson J.A. continued to state the following:-

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"The often patent honesty sincerity and conviction of an identifying witness remains, however, ever a snare to the judicial officer who does not constantly remind himself of the necessity of dissipating any danger of error in such evidence. "

What was earlier said in relation to the said two witnesses comes to the fore. In my view, all possibilities of dissipating error in such evidence have not been completely eliminated by the Crown.

Another difficulty in Crown's case is that whereas the indictment alleges that the deceased was assaulted with sticks, stones and submerged in water until he died, the evidence led did not support the assault with sticks and stones. The was further exacerbated by the fact that the cause of the deceased's death was not established. PW 5 stated that the deceased was submerged in water until he died but her account is fraught with problems because she stated that she was afraid, was a distance away from the scene and decided to run away and make a report.

It was Mr Simelane's submission that in order for this Court to find the accused guilty of murder, the Crown bears the onus to show that the accused is dead and that the death was pursuant to assaults inflicted by the accused. Evidence in this latter regard is not entirely clear. There is not an iota of evidence as to how the deceased's body was found in the bush except drawing an inference with no facts given on which to base that inference.

Another bottleneck for the Crown in this case was establishing the motive for the killing. In its outline of the case at the commencement of the trial, the Crown stated that it would lead evidence to show that something unsavoury was said by the deceased to Shona Mamba about the way he walked. No such evidence was led. What transpired was that there was a quarrel between the deceased and Accused 1 over a woman. There is no evidence to show how the other accused persons got entangled in this web and there was no evidence led or facts given from which common purpose can be inferred.

In *S v VAN DER MEYDEN* 1991 (1) SACK (1) 447 at 449, Nugent J. propounded the law as follows, and correctly in my view:-

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"The onus of proof in a criminal case is discharged by the State if the evidence established the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see for example, *R v DIFFORD* 1937 AD 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent

explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other. In which ever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt, and so too does not look at exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true."

The conclusion I arrive at in this case is that the Crown has not proved the accused persons guilt beyond a reasonable doubt. There is some doubt that persists as to whether it was the accused that committed the offence. Where such a doubt exists it must operate in favour of the accused.

I come to this conclusion not without any difficulty. There are certain issues regarding the defence case that cause spasms of disquiet. As mentioned earlier, PW 7 seemed to be concealing certain information. Even Bhutana Dlamini was clearly concealing information and even said so. There are occasions when he looked at Accused 1 before answering questions put to him. Accused 1 was not very convincing as a witness and the alibis raised by the accused persons were not convincing. No witnesses to confirm their various stories, other than Accused 1 were called. I also pause to mention that PW 5, in cross-examination stated that the digging of the borehole took place only in the mornings and this was accepted by especially Accused 4 thereby rendering his defence of alibi suspect.

In mentioning these issues I am quite alive to the legal proposition that it is not for the accused to prove their innocence, the onus being on the Crown throughout. In respect of the alibis, Greenberg J.A. in R v BIYA 1952 (4) SA 514 (AD) at page 521 had this to say:-

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"If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime".

In this case, there is a reasonable possibility that the alibis are true, notwithstanding the absence of corroboration thereof. I am also alive to the oft quoted locus classicus excerpt from R v DIFFORD 1937 AD 370 at 373 by Watermeyer J.A. which follows below:-

"It is equally clear that on onus rests on the accused to convince the Court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."

I therefor come to a conclusion that the accused persons be and are hereby acquitted and discharged and it is so ordered.

T.S. MASUKU

JUDGE