

THE HIGH COURT OF SWAZILAND

CRIM. CASE NO. 85/97

In the matter between

REX

Vs

ZACHARIA SHABANGU

MCINISELI MPHILA

KUSA THWALA

Coram S.B. MAPHALALA - J

For the Crown MR. B. SIMELANE

For the Defence MR. B. SIGWANE

JUDGMENT

(24/04/2002)

i) The Charge and Plea:

The indictment reflects that the accused persons are charged with two counts as follows:

Count one

Attempted murder, in that upon or about the 23rd December 1996, and at or near Nsangwini area also known as Ndlembeni area in the Hhohho region, the said accused persons each or all of them acting in common purpose unlawfully and with intent to kill did set the dwelling house of Albert Sikhwahla Mamba on fire well knowing that Albert Sikhwahla Mamba was in the dwelling house.

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Count two

Malicious injury to property, in that upon or about the 23rd December 1996, and at or near Nsangwini area also known as Ndlembeni area in the Hhohho region, the accused person each or all of them acting in common purpose did unlawfully and intentionally injure one dwelling house the property of Albert Sikhwahla Mamba by setting the dwelling house on fire with intent to injure Albert Sikhwahla Mamba in his property.

The accused persons all pleaded not guilty to the charges and their respective pleas were subsequently confirmed by their counsel.

ii) Chronicle of the Crown's Evidence:

The crown, in support of its case called the evidence of four witnesses.

The first witness for the crown was PW1 Albert Mamba the complainant. He related the sequence of events leading to the burning of his hut on the 23rd December 1996 by a number of people including accused no. 1, 2 and 3. He told the court that the time was past 10.00 pm when he was seated in his

home cleaning his traditional regalia "(sigeja)" in preparation for the Incwala ceremony. He went out of his hut to see if the fowl hut was properly secured for the night. When he went back to his sleeping hut to prepare to retire for the night, he saw accused no. 2 and 3 passing by the door. Accused no. 2 was carrying something which looked like an axe. He then heard people banging his house and removing the corrugated iron sheets from the roof. These people then sprinkled a liquid which he assumed was petrol in the holes after the corrugated iron had been removed. These people lit some grass and threw it inside the sleeping hut and his clothing's started to burn. Seeing that he was being killed he raised an alarm for help in the traditional way. He told the court that he did not get assistance. His homestead got burnt. He testified that he took off the clothes he was wearing and wore an overall. He then decided to flee the scene and he took an axe with him. Outside he saw that there were people outside as the house was burning. He ran away from the scene. The people who were outside could have been more than ten in number. He could only identify accused no. 2 and 3 as he was running away he was hit with an axe on his shoulder. The axe dropped down and he saw it. He ran to the police. He reported the incident the following day. He was sent

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to hospital on the 24th December 1996, where he was treated and discharged. From there he went back to the Piggs Peak Police Station where he was kept for his safety. On the 25th December 1996, he went with the police to his home. He found everything had been destroyed.

PW1 further told the court that prior to this incident when he was still building his homestead 29 people came to him to attack him. They said he should leave the area. They were against the headman "induna" who had allowed him to settle in the area. The matter went to court and four of the 29 people were warned by the court not to interfere with him. He told the court that prior to this incident his relationship with the accused persons was friendly and cordial.

PW1 was cross-examined at length by defence counsel. All in all it was put to him that he did not have the opportunity to see his assailants on which he replied that he saw accused no. 2 and 3 on the day of the attack. He also told the court no one had a reason to burn down his homestead.

The crown then called PW2 1988 Mavuso who was one of the investigating officers in this case that on the 24th December 1996, he was on duty at the Piggs Peak Police Station when PW1 reported a case of attempted murder and that his homestead had been burnt down by unknown people. He recorded a statement from the complainant.

The crown then called PW3 Malungisa Dlamini who was introduced as an accomplice witness in terms of Section 234 of the Criminal Procedure and Evidence Act (as amended) No. 67 of 1938. He related at great length the role he played in the burning of the complainant's homestead. He told the court that he was complainant's neighbour together with the accused persons. He told the court the fire at complainant's homestead was started by himself and the accused persons before court. The accused persons came to his homestead at around 8.00pm on the 23rd December 1996, and they told him that they should all proceed to go and burn the "witch's home" because he has been problematic in the area. By "witch" they were referring to the complainant. Zacharia Shabangu (accused no. 1) was carrying a pick and hoe ("ingalwane") Kusa Thwala (accused no. 3) was carrying a spear and

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Mciniseli Mphila (accused no. 2) was not carrying anything. He was carrying a stick. They then proceeded to the complainant's homestead.

When they got to the complainant's homestead they gathered some dry thatched grass and placed the grass by the door of his house and then they lit the grass. After they had lit the grass that is when the complainant ran away from the homestead. After the complainant ran away they then decided to go to their respective homes because it was dark and they were afraid that the complainant might come back from any direction and attack them.

PW3 was cross-examined at great length by Mr. Sigwane for the accused persons. It was put to him that on the day in question he was not sober and his powers of perception were affected due to the influence of alcohol he had been imbibing throughout the day, to which he answered to the affirmative. It was put to him that upon hearing the complainant shouting on top of his voice calling for help, and blowing his whistle, his neighbours including the three accused persons came to his rescue as per the custom. PW3 answered that he would not know. He insisted under cross-examination the three accused persons accompanied him to the complainant's homestead where they assisted him in burning down the complainant's house. He also stated under cross-examination that it was not true that the accused persons met him along the way when they were responding to the complainant's cry for help. It was further put to him that he was the only person responsible for burning down the complainant's house. He denied that allegation stating that the three accused persons came to his homestead that night en route to the scene of crime.

The crown then called PW4 2369 Constable Mngomezulu who told the court that on the 25th December 1996, he attended the scene of crime at Nsangwini. He saw a house which had been destroyed by fire. He collected some exhibits. One of the exhibits he found from the scene of crime was a trunk box. The other items at the scene were burnt beyond recognition. The following day he arrested the accused persons and PW3. (the accomplice witness). Subsequently, accused no. 2 directed him to the scene where he extracted a head of an axe from the ashes.

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He was cross-examined at some length on the discovery of the axe. He told the court under cross-examination that he did not point out the axe, but he searched through the ashes until he found it. It was put to him that when he went to the scene of crime with accused no. 2 he had been there prior to which he answered in the affirmative. That he had seen most of the items viz, the plank, the trunk box and a piece of wood save the axe which he first saw when accused no. 2 was also at the scene.

iii) The Defence Evidence:

All three accused persons gave evidence under oath in their defence being led by their attorney Mr. Sigwane. They were cross-examined by the crown. There is a common thread that runs through their respective accounts as to what transpired that day. They told the court that they were in their respective homesteads engaged in their own affairs when at around 8.00pm to 8.30pm they heard an alarm ("inyandzaleyo") from the direction of the complainant's homestead. Accused no. 1 told the court that he heard the blowing of the whistle. He took his small axe and ran straight to where the alarm was being raised. When he got there with others they found that the house had already burnt. He met accused no. 1 and no. 3 at the complainant's homestead. The complainant had already fled the scene. He told the court that he found PW3 at the scene of the crime and that it was not true that they picked PW3 at his homestead with the other accused persons. It was not true that he gave matches to PW3 to light the fire at the scene. He did not attack the complainant with the axe. He further told the court that he observed at the scene that PW3 was drunk.

Accused no. 2 told the court that when the alarm was sounded in the direction of the complainant's homestead he went out of his house and he saw a big flame coming from the direction of the complainant's home. He heard other neighbours also sounding an alarm that the complainant homestead was burning and then he proceeded to the scene. As his homestead was nearest to the complainant's homestead he was amongst the first group to come to the complainant's homestead. He saw PW3 emerging from a toilet nearby and they proceeded together to the complainant's homestead. They tried to put off the fire which had already engulfed the roundavel. At that point the complainant came running. This witness told the court that the reason the complainant associated him with the people who burnt his

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house was because they have had quarrels in the past and there was bad blood between them. He

further told the court that when he went to the scene he was not armed with any weapon-whatsoever.

He never conspired with anyone including his co-accused to burn down complainant's homestead. Accused no. 2 denied that together with the accomplice witness they took some grass and place it next to the flat where the complainant was at the time. He told the court that the reason he went to the complainant's home on the day in question was in answer to the alarm as it was expected by tradition. He told the court that officer Mngomezulu was the one who found the head of the axe after rummaging through the ashes with his firearm. The axe which was carried by accused no. 1 was not the axe which was exhibited before court.

Accused no. 3's version is that at about 8.00pm to 8.30pm there was a family function at his homestead when they heard the alarm being raised. He went out of the house where the family had gathered to observe the source of the alarm. He went back to join his family and was ordered to sit down to finish the meeting. Again at about 9.00pm his father told him that there was another alarm which was being raised. He went out and proceeded to where the commotion came from. On arrival at the scene he saw that there were many people there. He went back home to report what was happening. He then took an iron rod and went back to the scene. When he got there he got a report from one of the people who had gathered there that there was nothing more they could do as the houses in the complainant's homestead had been destroyed by the fire. He saw Malungisa (the accomplice witness) who told him that he also came in answer to the alarm. He said something to him though he was incoherent and said he was drunk and wanted to go and sleep. Accused no. 3 then went home as many people who had gathered there were dispensing to their various homes. He did not enter the complainant's homestead that night at all. It was not true that he was in cohorts with Malungisa when the homestead was burnt. Malungisa told him that he was forced by the police to implicate them in the commission of these offences.

iv) The Crown's Submissions:

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Mr. Simelane contended that the crown has proved its case beyond a reasonable doubt as the evidence of the complainant is sufficiently corroborated by the evidence of Malungisa (the accomplice witness). The complainant was in his house preparing his traditional attire when he was attacked by the accused persons. He identified accused no. 2 and accused no. 3. He did not identify accused no. 1. Malungisa identified accused no. 1. Complainant said two corrugated iron sheets were removed and after that he could smell petrol which was poured on him. He could clearly identify these people. The crown contends that his evidence was credible after a long and relentless cross-examination. His story converges in all material respects with that of Malungisa who also, according to the crown was credible and came unscathed after a long and gruelling cross-examination. Mr. Simelane punched holes in the evidence given by the accused persons when giving evidence stating that their versions were not put to the crown witnesses for them to be believed. He relied on the dicta by Hannah CJ (as he then was) in the often-cited case of Rex vs Dominic Mngomezulu and 10 others where the learned Chief Justice held that failure by the defence to put the story of the accused lead the court to draw an inference that whatever he says for the first time in his evidence-in-chief must be clearly regarded as an afterthought.

v) The Defence's Submissions:

Mr. Sigwane argued an contraire that the crown has failed to prove its case beyond a reasonable doubt. He argued that the crown has ignored the evidence of PW2 who is the police officer who took a report from the complainant the following morning of the incident. The evidence of PW1 (the complainant) and PW2 is beyond reconciliation. How can the crown say that the complainant actually saw and recognised accused no. 2 and accused no. 3 when the evidence of PW2 (the police officer) was that the complainant came to the police station on the morning after the attack and reported that he was attacked by unknown persons?

Mr. Sigwane went on to outline a number of material contradictions between the evidence of the complainant and that of the accomplice witness.

vi) Conclusion:

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I have reviewed the evidence in its totality and I have also considered the submissions brought forth by counsel. My view on the matter is that the crown on the totality of the evidence before court has failed to prove its case beyond a reasonable doubt. The reasons for coming to this conclusion are as follows:

Firstly, why did the complainant when he reported the matter the following morning to PW2 the police officer not say that he was attacked by accused no. 2 and accused no. 3 when his memory was still fresh? Clearly, either PW1 or PW2 is not telling the truth. The question is what reasons did PW2 the police officer have to give false testimony against the accused persons. Clearly, if PW2 was not telling the truth it was up to the crown to impeach this witness.

Secondly, there is a major contradiction between the evidence of the complainant as to the number of people who were involved in the attack. PW1 told the court that he saw accused no. 2, accused no.3 and a third figure he could not identify. On the other hand the accomplice witness said they were four in number when they proceeded to the home of the complainant.

Thirdly, the complainant told the court that his door was opened and that is how he was able to see these three people. After seeing these people he shut his door and proceeded to attend to his loin skins unperturbed. The accomplice witness on the other hand told the court that when they proceeded the door was shut and there was no sign of the complainant. They picked up some grass and lit it. He then saw the complainant coming out running into the night.

Fourthly, the complainant told the court that petrol was poured on one of the rooms. He said that accused no. 2 pulled up one of the corrugated iron sheets and poured something which smelt like petrol and lit the fire. The accomplice witness was there throughout and did not allude to the pulling off the roof sheeting. He said he never witnessed such an incident. Under cross-examination by Mr. Sigwane he said nobody amongst them was carrying petrol or poured petrol on the roof.

Fifthly, on the number of people who were at the scene when the attack was in progress. The complainant told the court that they were over 10 (ten) people at the

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scene. The accomplice witness maintained that the complainant was not telling the truth that there were more than 10 people, that according to his version they were four (4) people.

Further, I could not rely on the evidence of the accomplice witness who told the court under cross-examination that his powers of observation were impaired due to his drinking. He was simply drunk on his own admission.

Lastly, as an aside, it would appear to me that this was a single but unfortunate event occurring in a rural setting where members of the community of Nsangwini including the accused persons on the eventful night of the 23rd December 1996 heard an alarm being raised. This seems to be common cause. The community in answer to the alarm rushed to its source which turned out to be the homestead of the complainant. Upon the arrival of the community including the three accused persons it was discovered that the structures wherein were consumed by the fire.

In Swazi customary practice whenever there is such a call ("inyandzaleyo") members of the community are morally and culturally expected to answer it. It is a call which is not taken lightly because in most cases it means innocent loss of life or property. Because of its nature it normally sends a wave of panic in that community moreso, if it is made at night. For this reason people are usually not expected to act rationally and are usually armed and there is nothing sinister which attaches to this in these extraordinary

circumstances.

For the afore-going reasons I find that the crown has not discharged its onus of proving its case beyond a reasonable doubt and the accused persons are found not guilty and they are acquitted forthwith.

S.B. MAPHALALA

JUDGE