

IN THE HIGH COURT OF SWAZILAND

CRIMINAL CASE NO.63/01

In the matter between:

1. **SIMON GEORGE MAMBA**
2. **BONGANI B. ZWANE**
3. **THEMBINKOSI M. MHLANGA**
4. **MFANIMPHELA MASILELA**

CORAM	:	MATSEBULA J
FOR THE ACCUSED	:	MR. E.M. MAZIYA
FOR THE CROWN	:	MR. N. MASEKO

JUDGMENT

25th February 2002

The five (5) accused stand charged with the crime of murder in that upon or about 10th September 1999 at or near Ndunayithini area in the District of Lubombo, the said accused, acting unlawfully and in furtherance of a common purpose and with intent to kill did assault PAUL BHEKIMPI TSABEDZE with stones and sticks causing him multiple injuries from which the said PAUL BHEKIMPI TSABEDZE died on the spot.

When they arraigned on the 6th May 2001 they all pleaded not guilty ad accused 1,3 and 5 are represented by Mr. Mamba whilst

accused no.2 and 4 are represented by Mr. Magagula.

At the commencement of the trial Mr. Maseko counsel for the Crown informed the court that he had made an addition of the summary of evidence dealing with certain witnesses who had obtained certain statements from accused 3,4 and 5.

Mr. Mamba indicated that he, would challenge the statement on behalf of his clients accused numbers 3 and 5. Whilst Mr. Magagula stated that on behalf of his client i.e. accused no.4 would not be challenged.

In view of the challenge of some of the statements the court indicated that a trial within a trial would be conducted. However, as the witnesses were not immediately available it was agreed between the parties that the trial would proceed and the trial within a trial be conducted once the witnesses were available.

There was also an application for an amendment to the date reflected on the charge sheet as the 11th September 1999 to be amended to read 10th September 1999. The application was not opposed and the court granted it. Although the wife of the deceased was called in by the Crown to testify about her late husband, the deceased, her evidence was to the effect that he had in fact died and that she had identified his dead body. In so far as the autopsy is concerned the defence allowed the postmortem report to be handed in by consent. It was handed in as exhibit "A". According to exhibit "A" deceased died due to cranio-cerebral injury and penetrating injuries. At page 2 and 5 of exhibit "A" is a detailed account of the injuries. The court will revert to the account dealing with the injuries when dealing with certain exhibits which were handed in during the trial. Deceased's wife was called by the Crown as PW1, her name is Sibakabaka Lucy Tsabedze.

PW2, Siphon Mamba testified that he had met deceased on the fateful day. He and deceased had stood together and had a chat about farming. It was, as they were chatting that PW2 saw some boys numbering plus minus 5. PW2 knew that they resided at a place called Hhontshane. It was his evidence that some of these

boys were the accused before court. PW2 specifically mentioned accused no.2 and 4 and said a fourth boy was one who went by the surname of Mamba. PW2 said the boys greeted him and the deceased and passed on. Deceased also left PW2 subsequently in the same direction to which the boys went.

PW2 learned later that a dead body was found. This body turned out to be that of the deceased.

Mr. Mamba on behalf of his clients had no questions to put to the witness. Mr. Magagula put some questions to the witness which were strictly speaking questions whose answers were common cause.

The court has also put a few questions for clarity's sake and PW2 stated that Ntuli Mhlanga is accused no.4 and Mavimbela is accused no.2 whilst accused no.3 is Zwane. PW2 said he was not well acquainted with accused no.5. Arising from the courts questions and answers thereto Mr. Mamba asked the witness if he knew accused no.5's surname and the witness said he heard people say that accused no.5 was a Masilela. PW2 said he had seen accused no.5 in the group of the boys who wet passed as he and deceased were chatting. He said he knew all the boys except the one i.e. accused no.5. PW3 Eric Dumsani Mamba was introduced as an accomplice witness. On the day in question he met accused no.2 and accused no.4 and others. They were at a bus stop known as Magongo and they enjoyed some drinks. Some passengers alighted from a bus and amongst those was the deceased Paul Tsabedze who was his uncle. He had a chat with the deceased and deceased bought a cabbage from a girl who was a vegetable vendor. PW4 then went back and joined the group of boys with whom he had been socialising. One of the boys then said to PW3 that his uncle was an insolent man who was in the habit of doing wrong things. PW3 said he did not take this seriously. They i.e. PW3 and the boys continued drinking. After a while they went to a paternal homestead of his - a Mamba.

Some of the boys stood at the gate whilst others entered the homestead of those who entered was accused no.3 and 4. Accused no.5 did not enter. From here the group proceeded to walk and occasionally reference was made to his uncle the deceased as a wizard and one who was a menace in the area.

PW3 said all along accused nos 2, 3, 4 and no.5 were walking along with the group.

PW3 corroborates the evidence of PW2. PW3's evidence is to

the effect that after passing PW2 and deceased where they were chatting he lied to his companions that he was going to relieve himself when in fact he was avoiding their company and going to his girlfriend's place. As he left the group he met the deceased some plus minus 200 metres away from the group. Deceased again greeted his nephew PW3 and asked him where was he now going PW3 told his uncle that he was going to his girlfriend's place. It was his evidence that deceased proceeded towards the direction where the group of boys were. PW3 met his uncle accused no.1 proceeding towards the direction where deceased and the boys were. PW3 said accused no.1 asked him why was he going the opposite direction instead of going to Hhontshana. It should be remembered that the place Hhontshana is the area where the group of boys reside.

The evidence of PW3 was then interrupted by the Crown when they attempted to declare the witness hostile. After a careful consideration of this application was turned down by this court. Both Mr. Mamba and Mr. Magagula also opposed the application by the Crown. The Crown did not deem it fit to proceed with the witness' evidence. In answer to the court's question the witness stated that all the accused on this day were present.

He said they were all drunk with the exception of accused no.5.

The Crown also led the evidence of PW4 Sipiwe Maponono Dlamini. Her evidence basically was that accused nos 2, 3, 4 and 5 came and had some talk with PW3. PW4 did not hear the contents of their discussion.

In answer to the Court's question PW4 said she knew all the boys and mentioned accused nos 1-4 and it is only accused no.5's name she did not know but she saw him.

PW5 Thulisile Dlamini's evidence was totally irrelevant and did not take the Crown case any further.

PW6 was Sergeant Inspector Vilakati. He is based at the Lubombo Police headquarters. On the 15th September 2001 accused nos 3 and 5 arrived at the Lubombo Regional Police headquarters. He asked them how he could help them and they told him they had a misfortune when a human being died at their hands accidentally. PW6 then cautioned them in terms of the Judges' Rules. Accused nos 3 and 5 then deposed to certain statements and they had come voluntarily on their own and had not been arrested. PW6 then contacted

Lubuli Police station and accused nos 3 and 5 were handed over to the Lubuli Police. Neither Mr. Mamba nor Mr. Magagula had any questions for the witness.

PW7 Detective Sergeant Mkhabela investigating officer in the case. On the 11th September 1999 he and others proceeded to Ndwayethini area. He was shown the body of the deceased lying in some shrubs. The body had serious injuries and the head had some brain tissues exposed. PW7 said there were signs of struggle on and surrounding the area where the body was found. On the right buttocks the deceased had stab wounds. He noticed blood stains, stones and broken sticks. The body of the deceased was conveyed to the mortuary. Arrests were subsequently made and those arrested included accused no.1. He cautioned accused no.1 at his arrest and took him to the police station where he once again cautioned him in terms of the Judges' Rules. As a result of a report made by accused no.1 accused no.2 was also arrested. It was his evidence that the other accused surrendered themselves at different police stations. These were accused nos 3, 4 and 5.

At the scene of the crimes PW7 found broken pieces of sticks and stones which had blood stains. He further warned accused no.2 and accused no.2 produced a knife and axe. In the possession of accused no.1 a bush knife was found. The broken sticks were handed in collectively as exhibit 1. Stones handed in as exhibit 2. Clasp knife handed in as exhibit 3.

The axe handed in as exhibit 4 and the bushknife handed in as exhibit 5.

At some later date some of the accused were taken to judicial officers for the recording of statements.

Mr. Mamba on behalf of his clients reserved cross-examination until the trial within trial was conducted.

PW8 Lindiwe Matse a judicial officer. This court was perfectly satisfied that the Magistrate made sure that the deponent Bongani Zwane made the statement freely and voluntarily whether this statement is a confession or not will be dealt with later when the contents of the exhibits "B" are considered in their totality. For now, it is sufficient that exhibit "B" was properly admitted. For the purpose of this judgment exhibit "D" was also properly admitted. In so far as exhibit "C" this was handed in by consent.

The question whether these exhibits "B" "C" and "D" in

respect of accused nos 3, 4 and 5 respectively are confessions or exculpatory statements will be dealt with later. For the present moment suffice it that they form part of the proceedings in this trial. Earlier in my judgment mention was made of the evidence of PW2 Siphon Mamba. On the day that deceased was murdered PW2 saw these boys of Hhontshana area. It was his evidence that they numbered four or five. PW2 knew these boys and mentioned the names of some of them. He mentioned accused no.2 Siphon Mavimbela, accused no.4 Ntuli Mhlanga and Mamba accused no.1. It was his evidence that when deceased left he took the same direction accused had taken.

The court put certain questions to PW2 and one of the answers thereto was that accused no.3 was also seen by the witness and his name is Zwane. He said accused no.5 was not well known to him but he knew his name as Masilela. He also saw him. Under further cross-examination by Mr. Mamba, PW2 said he knew accused no.1 and that he had also seen him as one of the five boys.

PW3 Eric Mamba whose evidence has been dealt with earlier said inter alia that accused no.2 was amongst the boys. PW3 also named PW4. It was PW3's evidence that as they enjoyed some brew at Magongo's bus stop area, some people alighted from a bus and amongst the passengers was his uncle the deceased and later he joined the group. It was at that stage that one member of the group remarked that deceased was an insolent man who was in the habit of doing wrong things in the area. The group of boys then went past a Mamba's homestead. Some waited at the gate whilst others entered the homestead. Those who entered subsequently came out and the group proceeded along the foot path and as they proceeded the group would say "the wizard" by this, PW3 said they were referring to his uncle the deceased. PW3 said the group would say the deceased was a menace in the area.

It was PW3's evidence that when these utterances were mentioned by the group present was accused no.2 and others. He said accused no.3 was also present, as well as accused no.4 and accused no.5. PW3 mentioned these accused by their names. They proceeded and came upon the deceased where he and PW2 were chatting. From then they proceeded for a distance of plus minus 200 metres apparently waiting for the deceased. It was at this stage that PW3 decided to lie to the group by saying he was going to relieve himself when in fact he was going away for good to go and spend a night at his girlfriend's place. PW3 met deceased some plus minus

200 metres proceeding towards where he left the group. He spoke to deceased and immediately thereafter he met accused no.1 proceeding towards the direction of the group.

PW3 proceeded and went and spent the night with his girlfriend PW4 Siphwe Maponono Dlamini. PW4 corroborated PW3's evidence about spending a night with PW3. She said whilst in bed with PW3 four (4) boys arrived and requested to see PW3 outside the house in which they were sleeping. After some 30 minutes PW3 returned to the house but she was unable to hear what the four boys discussed outside with PW3.

PW4 subsequently learned about the death of the deceased. Another meeting between PW3 and amongst others accused no.2, accused no.4 and others took place at PW4's homestead

I have dealt at length with the evidence of PW2, 3 and 4 because their evidence corroborate the contents of the documentary evidence contained in exhibit B, C, & D.

PW3's evidence and this was unchallenged is to the effect that he and accused no.2, 3, 4 and 5 went and stood at PW3's paternal uncles's homestead's gate a certain Mamba.

The group moved on until they reached a point where PW3 dodged the group that he was going to relieve himself. As PW3 left the group he met deceased proceeding towards the group. PW3 also met accused no.2 carrying a small stick. From the evidence of PW3 relating to accused no.1 it is not clear what part accused no.1 played in the threats and allegation that deceased was a wizard and a menace in the area. The fact that he was moving towards the group of boys and that he had a stick is insufficient for the purposes of association in the common, illegal purposes of connecting him with the **actus reus**. With accused no.1 it has not been proved beyond a reasonable doubt that he associated and participated in the **actus reus**. The court cannot take cognisance of the contents of any of the exhibits "B", "C" and "D".

The same cannot be said of accused nos 2, 3, 4 and 5. Accused no.2 clearly associated himself and participated when the group of which he was a member uttered threats and referred to deceased as a wizard and a menace in the area. This evidence has not been challenged and the contents of exhibit "B", "C" and "D" are only corroborative of what eventually happened to the "wizard and the menace". He was killed in a violent faxeion. The evidence of how deceased

met his death is further corroborated by exhibit "A" and exhibit "A" in turn corroborates exhibit "B", "C" and "D" in so far as the weapons used.

The court rejects accused no.3's defence that he attacked deceased under duress as he states in exhibit "B".

I also reject accused no.4's evidence that he was an onlooker and did not take part in the assault on deceased. I also reject accused no.5's defence that he was an onlooker and did not do anything to deceased.

In so far as the allegation that the accused acted in furtherance of a common purpose I refer to **CASE NO.25/99**.

Patrick Wonderboy Ngwenya where the following appears:-
"Association in a common illegal purpose constitutes the participation - **actus reus**. It is not necessary to show that each party did a specific act towards the attainment of the joint object. Association in the common design makes the act of the principal offender the act of all".

The learned Judge of the Court of appeal also referred to **S V SAFATSA AND OTHERS** with approval.

In the result, accused no.1 is found not guilty he is acquitted and discharged. Accused no. 2, 3, 4 and 5 are found guilty as charged.

JUDGMENT ON SENTENCE

The crime of which you have been convicted of is a very serious one. The court has found extenuating circumstances to exist. In mitigation the court takes into account the following:

1. The state of your sobriety at the time of the commission of the offence;
2. Your youth;
3. The period you have spent in custody i.e. as from 11th September 1999;

Considering all the above factors this court passes the following sentence:

Accused no.2 is sentenced to an imprisonment for eight (8)

years backdated to the 11th September 1999.

Accused no.3 sentenced to an imprisonment for nine (9) years backdated to the 11th September 1999.

Accused no.4 is sentenced to an imprisonment for nine (9) years backdated to the 10th September 1999.

Accused no.5 is sentenced to an imprisonment for eight (8) years backdated to 11th September 1999.

J.M. MATSEBULA

Judge