

IN THE HIGH COURT OF SWAZILAND

HELD IN MBABANE

CRIMINAL CASE NO. 253/2002

In the matter between:

REX

Vs

SIPHO DOUGLAS GAMA

AND

MATTHEWS MPANZA

CORAM

ANNANDALE, ACJ

For the Crown

Mr. S. Fakudze

For the 1st Accused

Mr. B.J. Simelane

For the 2nd Accused

Mr. M.J. Dlamini

JUDGMENT

8 September 2004

During the month of April 2000, a series of crimes were committed in the Hhohho region of Swaziland. It commenced with the burglary of

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Mankumbulo Matibuko's house at Nyakatfo on the 7th April, whereat his shotgun and another weapon was stolen from his safe. Soon thereafter, on the 10th April, Goodness Mthupha was shot and killed in her house at Mayiwane while Albertina Mthupha escaped death during the same incident. Following hot pursuit by the Police, the stolen shotgun, which was used to shoot the deceased, a shotgun cartridge and other weapons were recovered by the police from their quarry. The police arrested three suspects. Subsequently, following the withdrawal of charges against Sibusiso Ndathane Sifundza, who testified as an accomplice at the trial, the remaining two persons were jointly prosecuted for the murder and attempted murder, with only the first accused standing trial for the housebreaking and theft as well as the illegal possession of the shotgun and ammunition. Both pleaded not guilty to all counts and both were represented by attorneys at the trial.

The five counts were formulated as follows:-

COUNT 1: MURDER: In that upon or about 10th April, 2000, and at or near Mayiwane area, in the district of Hhohho, the accused persons, each or all of them acting in common purpose, did wrongfully, unlawfully and intentionally kill Goodness Mthupha.

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COUNT 2: ATTEMPTED MURDER: Accused Nos. 1 and 2 are guilty of the crime of Attempted Murder in that upon or about 10th April, 2000, and at or near Mayiwane area, in the district of Hhohho, the accused persons, each or all of them acting in common purpose and with the intention to kill, did

unlawfully and intentionally assault Albertina Mthupha with a bushknife and thereby commit the crime of Attempted Murder.

COUNT 3: ARMS AND AMMUNITION ACT: Accused No. 1 is guilty of the crime of Contravening Section 11(1) read with Section 11(8) of the Arms and Ammunition Act 24 of 1964 as amended by Act No. 6 of 1988 in that upon or about 11th April, 2000, and at or near Nyakatfo area, in the district of Hhohho, the said accused person, not being a holder of a valid licence or permit, did wrongfully and unlawfully possess one shot gun to wit, 12 bore, serial number 372928.

COUNT 4: ARMS AND AMMUNITION ACT: Accused No. 1 is guilty of the crime of Contravening Section 11(2) read with Section 11(8) of the Arms and Ammunition Act 24 of 1964 as amended by Act No. 6 of 1988 in that upon or about 11th April, 2000, and at or near Nyakatfo area, in the district of Hhohho, the said accused person, not being a holder of a valid

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licence or permit, did wrongfully and unlawfully possess one live round of ammunition.

COUNT 5: HOUSEBREAKING AND THEFT: Accused No. 1 is guilty of the crime of Housebreaking with intent to steal and Theft in that upon or about 7th April, 2000, and at or near Nyakatfo area, in the district of Hhohho, the said accused person did unlawfully and intentionally and with intent to steal, break and enter the house there situate of Mankumbulo Matibuko and did unlawfully steal a firearm, to wit, shot gun 12 bore serial number 372928 and cash amounting to E1,500-00, the property, or in the lawful possession of the said Mankumbulo Matibuko.

#### The Crown's Case

Eight witnesses were called by the prosecution to testify at the trial, two of them introduced as accomplices. The first of these two was initially a co-accused, with charges withdrawn by the crown after he agreed to testify. He is Sibusiso Ndathane Sifundza, who testified about the sequence of events that ultimately ended in murder. He testified that on the 8th April 2000, he was approached by the second accused who took him to a bus stop

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in the Maphiveni area, where they met the first accused. The latter told them of an opportunity to rob a large sum of money, said to be half a million, and Sifundza readily agreed to participate in the robbery. The first accused told them that weapons were to be had at his house at Nyakatfo and that a fourth person would help them with the robbery, said to be one who works at the place where the robbery would take place. They did not decide how to divide the spoils. The three of them took a bus to Thambankulu from where they walked to the house of an aunt of the first accused, where they spent the night.

The following day the three of them travelled further up to Nyakatfo bus stop and started walking towards the homestead of the first accused. They furtively hid in a wooded area till nightfall in order not to be seen by the locals, and then proceeded. At the homestead they clandestinely entered it, crawling in underneath the fence and not through the gate. The first accused first went to a hut where he spoke with a woman, then left to later return with a firearm which he got from the same hut, and took them to an unfinished house where they spent some hours.

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Sifundza further stated that it was here that the first accused showed them the weapons that were to be used at the robbery. From a bag he took a shotgun, axe, swordlike panga as well as two balaclavas. The accused had a further balaclava ('cooper hat') for himself as well as a blue overall. The men were given the weapons of their choice, the second accused opting for the swordlike panga and Sifundza chose the tomahawk (axe).

As instructed by the first accused, the three of them rose at 02h00 the next morning and set off to Mayiwane area where they were told the robbery would take place. They arrived there at 06h30 and waited in the homestead's maize fields, observing some buses that stopped to let the conductors into the house. Half an hour later they covered their heads with the balaclavas, took their weapons and went to the house. The first accused told him to wait at the door while the first and second accused entered.

From the door, he said that he could see inside the house and that he heard the occupants being ordered to lie down. He also heard the first accused asking a woman where the money was and that she told him it is not there anymore but taken by one Derrick in the morning who left on a bus. While exhorting this information from her, he hit her with the swordlike

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panga which he took from the second accused. He also wanted to know the whereabouts of one La Ginindza, with the verbal response that she was in the bedroom.

In her own evidence, Mrs. Mthupha, the woman so assaulted, has it somewhat different, namely that she did not tell the first accused that LaGinindza was in the bedroom but indicated with her hand that she left through the kitchen and up the stairs, after she first said that she went out.

At that stage of events, the first accused then ordered the second to search for the money on top of the room divider while the first accused ran to the other side of the house, from where he soon afterwards heard a gunshot. When the shot sounded, the woman, Mrs. Mthupha, got up from the floor and fled out of the house, through the door where Sifundza still stood and raised alarm. The first accused then ran to Sifundza, castigating him for allowing the woman to get past him, then said that they should leave. As indicated below, the sequence of events differs in detail in Mthupha's version.

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The three men then took to the hills, from where they heard police car sirens. While on the hill, Sifundza said that the first accused fired a shot at him, afterwards explaining to him that it was accidental as he was unfamiliar with the gun's trigger action. From the hill they fled further but the police caught up with them and started shooting in order to stop them. His swordlike panga fell from his waist while the other two threw down their weapons on the run. Sifundza was caught after he fell down while the other two got away.

The further evidence of Sifundza is that when he asked the first accused about the shooting in the house, he was told that it was a warning shot to scare the people at the gate. He also gave details of the clothing worn by each of the three of them when they went to rob the homestead, leaving empty handed as the money had apparently been taken away before their arrival. After detailing their apparel, he was shown some items of clothing and other exhibits in court, which he related to each of the two accused and himself.

According to Sifundza, the first accused was armed with the shotgun and a wore greenish checked trousers, a green golf shirt, black shoes, a blue

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skipper and black jacket, with a black cap on his head. In court, the jacket, cap and shoes could not be found by him.

He said that the second accused, who was armed with the swordlike panga, wore a blue overall, black cap with 'Nike' logo and brown safety shoes, which shoes he could not locate among the exhibits.

Sifundza himself had a tomahawk axe and wore a red jacket, navy trousers, black leather shoes and beige/black 'Nike' cap.

He further identified three balaclavas which he said that they wore during the incident at the Mthupha

homestead.

As to be expected, introduced as an accomplice and having given detailed evidence of their criminal exploits, he was subjected to protracted cross examination. My overall assessment was that he made an exemplary impression as witness. He did not endeavour to exculpate himself at all - on the contrary, he detailed his role as participant in an unsuccessful robbery without over or under emphasising his role. Some finer details were solicited and obtained under cross examination. This must be seen in

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context - in his evidence in chief, Sifundza was to a great extent left alone by the crown counsel to tell his own story, without being interrupted to seek minute details. The only criticisms levelled against him was by way of submissions by the defence attorneys. I will revert to his evidence further down.

Dumisane Shongwe, also introduced as an accomplice witness, narrated his recollection of the burglary at Matibuko's homestead. He gave minute details of the proceeding events and how he came to meet the first accused. The latter met him at Zakhele while he looked for one Bongani, known to both of them. The accused splashed some money around, treating them to a braai. He enticed Shongwe to join him and Bongani to his homestead, to fetch more money. The carrot at the end of the stick was a possible job, the accused ostensibly being a well connected school headmaster at Vuvulane. After a tedious journey and as they neared the homestead, he noted that the first accused didn't use the gate but instead crawled through under the fence. His suspicions were confirmed when he was told that it was not the homestead of the first accused but that of a Mthupha. They waited under a tree while the first accused fetched a woman from a house of the homestead, who in turn took the men to a house still

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under construction where she fed them and where he and Bongani spent the night after the first accused left them there.

The following morning early, the first accused returned and told them that over a million was for the taking at the main Mthupha homestead and that a woman there had to be killed to get the money. They left for the homestead, carrying a "long knife", another knife and garments to conceal their faces. En route, they avoided the roadside, rather keeping to the bush. At the homestead two of them remained in the bush while the first accused went in, ostensibly to wait for the woman.

The "long knife", as he termed it, is one and the same (exhibit "D") as was also identified in court by the participant in the first two counts (murder and serious assault), Sifundza (PW2). He did not see the other knife in court, but also, like Sifundza, identified the green trousers (exhibit "A") and the balaclava (exhibit "J"), stating that those items of clothing were worn by the first accused at the time he saw him go to the Mthupha homestead. Thus, according to each of these two witnesses, the first accused wore the balaclava and green trousers at two different occasions and both place the origin of the sword/bayonet-like object with the first accused.

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Shongwe continued to testify that while he and Bongani waited for the first accused to return from the house, Bongani started to get cold feet and wanted to opt out, which he did, against the wishes of the first accused, when told about it.

Thereafter, Shongwe and Gama (the first accused) returned to the homestead where they spent the previous night. He says that Gama then came forward with the plan to steal the firearm at Matibuko's homestead, with which they would carry out the 'operation', i.e. the robbery. He then related how the two of them covertly went to the homestead and under false pretext gained confirmation from some children as to which of the huts at the homestead the gun was kept in. They waited for cover of darkness and broke the padlock of the door to gain entry and carried the gun safe out into the veld

where they eventually managed to open it. From the safe, they obtained the shotgun and tomahawk, which he identified in court as exhibits "E" and "F".

These are the same weapons identified by Sifundza as being used at the robbery and murder, also the same as identified by Matibuko as his

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stolen property, also the same as identified by the police officer (infra) as recovered from the fleeing suspects, chased after the murder of Mrs. Mthupha and the unsuccessful robbery.

It was after the firearm was stolen and on realising that it was intended to be used for robbery in due course that this witness, like Bongani before him, also got cold feet and managed to get away before it is too late. On his departure, having spent some two weeks there with Gama in preparation for the robbery, he says that Gama told him he would get others to help him with the robbery. The next week, he read in the press about the fateful outcome of the robbery in which he otherwise would have participated.

The origin of the shotgun that features in this trial was attested to by its owner, Mankumbulo Matibuko, the complainant in the housebreaking count. His evidence is that on the night of the 7th April 2000, he fell asleep, to be woken the following morning by his wife who raised an alarm. He left the main house of his homestead and went to the house where his safe containing his shotgun, a 'tomahawk' and E1 500 was kept, to find that the house, which was secured, had been broken into. He reported the incident to

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the police and pointed out to them where the house was broken open, also where the safe had been found. The safe was forced open from the back and the contents removed.

In court, he identified both the shotgun and tomahawk as his own -these two exhibits are the same as pointed out by various other witnesses. I noted that he did not look at the serial number on the shotgun, but instead used an intricate and well executed network of thin coloured wire cables that was tied around the stock at the handgrip. The tomahawk took on a more ominous appearance when Matibuko extracted a lethal looking 18 cm long concealed knife from the hollow handle, after releasing some mechanism on the axe-like weapon. He also produced his firearm licence (exhibit "S") which bore the same serial number as that embossed on the shotgun. He valued his total loss at E2 300, E1 500 of which was cash kept in the safe and with his valuation of the shotgun being E800, whereas the particulars of count 5 (housebreaking) has the value of the gun and cash as E1 500 in total.

His evidence was left unchallenged and undisputed.

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The police officer who investigated Matibuko's housebreaking complaint, Constable Mlangeni, testified as to how Matibuko came to report the incident. From memory he recited the serial number of the shotgun. He further related what he saw at the scene, as pointed out by the complainant, stating that entry was gained into the thatched stick and mud house through the door of which the handle had been broken. In the nearby vicinity, they found the safe which had an aperture broken into it. Three days later, he received a report of a shooting incident at a Mthupha homestead. He further added that the complainant also reported the loss of E1 500, the axe and two live rounds.

His evidence was not challenged either.

Further evidence of the final actions preceding the intended robbery and its fateful consequences was given by Lucy Vilakati, a young lady who stayed at the Mthupha homestead, a different one from the Mthupha homestead targeted for the robbery. She says that the first accused is her uncle and that she was to work at his homestead. On diverse occasions she was sent to the other Mthupha homestead

to collect money on instructions of the first accused's girlfriend.

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Her evidence is that she has seen the two men brought by her uncle to their homestead, that she tared for them while they were there and that one of the men left soon after his arrival while the second man, Dumisane (PW5), stayed for two weeks. While on one of her excursions to ask for money for the children, she met the first accused and Dumisane on her way and was asked details of the whereabouts of Gogo Ginindza at the other Mthupha homestead.

Her evidence served no other material purpose than confirmation of what Dumisane Shongwe said about the duration of his stay at the homestead of the first accused and the short duration of stay by the third person who initially accompanied them (Bongani). She did not establish the identity of gogo Ginindza as being the victim during the failed robbery at the Mthupha homestead, nor that she was the one visited by the first accused during the recce recounted by Shongwe at the homestead they targeted.

Further evidence about the fateful events at the Mthupha homestead was heard from Mrs. Albertina Mthupha (nee Ginindza) (PW1), the victim referred to in the second count. She related how she, Goodness Mthupha

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(the deceased referred to in count one) and a Dlamini were counting money on the 10th April 2000 when Goodness decided to go for a bath. Thereafter, she also wanted to bath but as she walked past the open kitchen door, she saw three men with covered faces approaching their house, the one in front brandishing a 'rifle'. The time was around 07h15.

With the help of the late Goodness Mthupha they managed to push the door closed while the intruders pressed on the other side but then a window was smashed through which a firearm was pointed at them. She then told Goodness to take cover and phone for help. On entry, the attackers overpowered Dlamini in the kitchen while she fled to the lounge, there to be ordered down by two men, one with a 'bush knife' the other with a gun, pointed at her. She says that she was then struck with the bushknife on the head and shoulder. On being asked by the man with the gun and saying that Lucky Ginindza is not home, he went up the steps to the bedroom where Goodness had gone to.

Meanwhile, she managed to get up and leave the house through the kitchen. At the kitchen door were the other two men. She heard a gunshot from within the house, and then she ran away and stopped a passing vehicle.

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She got in and they drove off, with her seeing her family's vehicle exiting the yard and driving off. On her arrival at the hospital she reported the incident. Others then went to the homestead and on their return told her that her daughter in law, Goodness, had been shot and is dead.

She could not identify the assailants as their faces were covered but recalled their clothing and armoury. From the items displayed in court she identified a pair of green trousers (exhibit "A"), long blue overalls (exhibit "B") and a red jacket, emblazoned with 'Swaziland Safety Glass' (exhibit "C") as clothes worn by the attackers. She also recalled that the firearm had a 'red and green something' on it, and identified the shotgun (exhibit "F") in court, same having an obvious visible woven plastic covered thin wire network neatly wound around the stock at the handgrip. She further identified the long swordlike bushknife (exhibit "D") and the tomahawk axe (exhibit "E") as the weapons the intruders carried with them. She further testified that the man with the green trousers (and a black jacket which she did not find in court) was armed with the shotgun. Further, that the man with the bushknife asked her about money during the attack.

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Her evidence relating to the colour of the trousers worn by the man armed with the gun ties in with that of Sifundza. He said that it was the first accused who wore those trousers and who was armed with the gun, also that he wore a black jacket. The evidence about the green trousers (exhibit "A") is however at odds with the version of Superintendent Mavuso (PW2, infra) who testified that those trousers were worn by Sifundza (PW3) at the time of his arrest.

Her evidence relating to the time when the shot was fired inside the house differs from that of Sifundza. He has it that when the shot went off, Mrs. Mthupha was still lying on the floor, she then got up and ran out through the door. Her version is that she was already outside, at the corner of the house, when she heard the shot.

Neither Mthupha nor Sifundza testified as to who rushed off in the Mthupha family's vehicle.

Finally, she gave evidence along the same line as did Lucy Vilakati, as to the latter's going to and from between the two Mthupha homesteads to seek money for the children. She then went further to add that Thulile (the

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woman who sent Lucy) was her daughter-in-law who, after the death of her husband and while still in mourning gowns, had a child with the first accused, Siphon Gama. Apparently, the affair started before the death of her husband and led to strained relationships, ultimately leading to a complaint at the 'Umphakatsi', but even there, this witness did not come face to face with the first accused, whom she only knew about by name.

Following the events at the scene of the Mthupha homestead and the flight of the attackers, Makhundu Mndzawe (PW3) testified about events that evening. He heard over the radio news about the attack before retiring to bed but was later woken by his wife who reported to him that she saw people with torches moving about at the neighbouring Mthupha homestead. Fearing trouble, he and his wife fled to a neighbouring farm, and returned after things quietened at the Mthuphas. Back home, he heard a knock on their door with a voice outside saying that he is Gama. As he knew him as one who treated him for a problem with his knees in the past, he opened and confirmed it to be the same person. He was then asked by Gama to show a safe haven for him. He says that Gama (the first accused) told him the reason for seeking his help was that he had killed a person at the Mthupha homestead and that he needed a place to hide.

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He did as asked but on his return home at around 08h00 the police were there, having already arrested his wife and one Thulile. He thereafter took the police to the place where he left the first accused in hiding, at a stream in a valley. On seeing the terrain, the police first mobilised members of the community with whose help the arrest of Gama was eventually effected.

The evidentiary facts that the first accused and Mndzawe have known each other from before these events, that the man took the accused to a forested area at request of the first accused and that he returned to the same area with the police remain undisputed. The main thrust of dispute lies with the details of whether the first accused stayed over at the house of this witness before, whether he actually arrived at the house as related by the witness or joined them earlier on, and whether he told the witness that he killed Mrs. Mthupha or not. The witness remained adamant that indeed he heard from the mouth of Gama that he killed Mthupha and that is why he acceded to take him to a hiding place.

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In conclusion of the case for the prosecution, details of arrests and related events were testified to by detective superintendent Mavuso, a seasoned police officer with 24 years experience. On receipt of a report he went to the Mthupha homestead where he found the deceased and ordered photographs to be taken of the body, the broken window (testified about by Albertina Mthupha PW1) and of the

homestead itself. (Exhibits U1 - 8),

From the homestead, he and other police officers drove to the nearby mountains to seek the attackers. They left the car and carried on by foot, after sometime to see three men moving towards them, but to turn and run when seeing the police. The police then opened fire. One of the three men threw down an object and Mavuso ordered one of the policemen to take and keep it. It was the blue overall (exhibit "B") in which the shotgun (exh. "F") was wrapped. It contained one round of ammunition (exhibit "T"). Two of the fleeing suspects outran the police but they caught up with Sifundza (PW2) and arrested him. He was duly cautioned and detained, to lead the police the following day to the house of the second accused, Mpanza, who was then also arrested.

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Thereafter, Mavuso returned to the area at the crime scene where he spoke to Mzamo, the neighbour (PW3), who took the police to a bushed area and on observing the area, the police decided to get assistance from the community members to help flush out the wanted suspect. With about 30 people to assist, the first accused was eventually apprehended and detained.

The day after his arrest the first accused volunteered to point out some items to the police, having been duly and properly cautioned of his rights and the consequences of such, according to Mavuso. Near the homesteads of the deceased and Mndzawe, the first accused pointed out a large carry bag (exhibit "H"), long blue navy trousers (exhibit "N") and a green golf shirt ("L").

It is this bag that the first accused produced and in which he had the weapons to be used, according to the evidence of Sifundza. Sifundza said that on their arrival at the homestead of the first accused, after he and the second accused were recruited by the first, Gama opened this bag and produced the tomahawk, panga and balaclavas, which were to be used at the robbery.

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Sifundza also testified that during the robbery, the green golf shirt was worn by the first accused and that he, Sifundza, wore the dark blue trousers (exhibit "N"). As mentioned before, Sifundza and Mavuso are at odds with each other in so far as the trousers are concerned, since Sifundza said that the green trousers (exhibit "A") were worn by the first accused whereas Mavuso has it that the same green trousers were worn by Sifundza at the time of his arrest.

Mavuso further testified that he could not be sure which of the three fleeing suspects carried which weapon but that in all they had the shotgun, tomahawk and swordlike knife or panga (exhibits "D", "E" and "F") between the three of them. He also recovered and handed in various other items like balaclavas, shoes and the red overall jacket.

Admission of evidentiary material like the post mortem report of the late Goodness Mthupha, the medical examiner's report of Albertina Mthupha and the photographs was by consent and authenticity was admitted. Serviceability of the shotgun was also admitted. The defence case

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Against this overwhelming body of evidence, virtually the entirety of the evidence by the first accused is one of "I do not know that". Details of the evidence for the prosecution was spoonfed to him by his attorney in bite sized chunks, as questions, to which he repeated his standard answer, namely that he does not know about it. The nearest he came to an explanation of his whereabouts on the day of the murder was that he was at the nearby homestead of Mndzawe, busy treating his patients. This alibi was not put to the man who placed him on the scene of the murder during the failed robbery. Also, Sifundza was extensively cross examined and accused of all sorts of falsity insofar as the first accused is concerned. If indeed the defence of the first accused was that he was nowhere near the scene of crime but "attending to his patients" elsewhere, it most certainly would have been the foundation of his cross examination by his attorney.

The evidence of the first accused, a threadbare denial, most certainly did not impress me as even

remotely possibly true. He could not give even a reasonable explanation as to why he would have been falsely incriminated by fabricated evidence of the men who said in detail how they committed the burglary and the failed robbery, at his instigation, after he recruited them for the job. In saying so, I remain very much alive to the fact that there is no

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onus on an accused to prove his innocence. I am also aware that where such damning evidence is adduced against an accused, he would at least try to explain it away, even if his version does not have to be believed by the court.

His version of treating patients on the day of the murder has to be seen in context. Mndzawe testified that it was only during the night of the murder, the 10th April, that he was asked by Gama to be taken to a hideout. Gama's version that he had already spent the day treating patients in the woods was not put to him like that, instead it was put that Gama spent the night of the 10th April at Mndzawe's house and that the two of them first spoke on the following day, the 11th. This was flatly denied, with Mndzawe repeatedly stating that over and above that, the first accused told him more than once that he was involved in the killings, therefore he needed a safe place to hide.

Gama further failed to impress by the indifference with which he tried to field the evidence of Lucy Vilakati (PW6) when confronted with her version of him bringing Dumisane Shongwe (PW5 ) and another man to his homestead, prior to the events.

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He also could not explain away the evidence of Mavuso who chased after him and later effected his arrest with the help of members of the community. If indeed he was peacefully going about his own business of digging roots and muti, or treating his patients, at that time, it is totally at odds with the crown's version of how he tried to escape. His explanation that he was simply frightened by the many people does not go down at all.

Gama came across as almost a pitiful figure when he offered all kinds of explanations as why it could not be, at all costs, that he would have been in Manzini some four years ago in the month of March 2000, the time he was said to have been at Zakhele from where he took Shongwe (PW5) and Bongani to his homestead.

As if it was necessary, his credibility was further diminished by the turn in his evidence from his instructions to his attorney regarding the child with Thulile Mthupha and whether they lived together or not. He could not make up his mind as to whether he is the father of the child or not, and whether they had lived together or not. He seems to set his sails according to the prevailing wind, changing his different versions as he sees fit.

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When confronted with issues pertaining to the Mthupha family and his alleged role in misunderstandings of the family, he displayed a very selective memory, conveniently confusing his own version vis-a-vis the instructions to his attorney. This becomes very relevant to assess his credibility, already threadbare, when his evidence under cross examination is compared to his version as put to witnesses called by the prosecution. The different versions he places before the court does not auger well for him.

The second accused, Mpanza, also testified in his own defence, also a bare denial of the events. He tried to set up a new defence of having been unable to be present where the crown's evidence had placed him, by saying that he was in Mocambique on the day of the murder, the 10th April, 2000. Conveniently, if he were to be required to produce his passport, he stated that he crossed the border illegally through the fence. Unfortunately for him he failed to brief his attorney about this new twist of the matter and accordingly, his absence from the scene of crime due to his alleged presence in Mocambique was not put to any of the crown's witnesses. It might be an imaginative defence but at

the same time it is a figment of his imagination, an afterthought. I cannot accept that such a crucial aspect of his defence would not have been instructed to his attorney.

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Mpanza made a valiant effort to discredit the evidence of Sifundza due to an alleged earlier incident involving the two of them. He says that in 1992 Sifundza and his brother broke into his house and in the process almost had his hand severed by Mpanza, acting to defend his property. He said that the burglary was in retaliation to him dismissing Sifundza from his work as builder with Maphanza but that the matter was resolved by the police and community leaders.

Because this version was not put to Sifundza he preferred the explanation that during the evidence of Sifundza, his own attorney was not in court and that it was too late to brief him on his return.

I am not to enter the arena as witness and my notes of appearances on the different dates of trial are not reliable enough to be conclusive, but it was recorded on the 25th February 2004 that cross examination of Sifundza continued and that Mr. V. Dlamini appeared for the second accused, while on the 29th January, 2004, when Sifundza continued with his evidence in chief, Mr. D. Dlamini represented Mpanza. It was on a very different date, the 2nd March 2004, on hearing the evidence of Constable Mlangeni (PW7)

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that attorney Gamedze stood in for attorney Dlamini. That same day, the evidence in chief of Mavuso (PW8) was also heard. He was cross examined on a subsequent day by attorney Dlamini, acting for the second accused. It thus seems to me that the position as stated by the second accused is indeed correct, if he referred to Mavuso, but not when he refers to Sifundza. I do not draw any conclusions from my recollection of the abovestated position and certainly not so adversely against the second accused.

There was however no application to recall Sifundza to be cross-examined on behalf of the second accused, in order to put the version of 'prior bad blood' to him. Should the witness Sifundza have concocted a story against the second accused by drawing him into the picture of willingly participating in heinous crimes while totally innocent, due to an incident of eight years previously, it would be of major importance. Such an unwarranted fabrication most certainly would have stirred the emotions of the second accused sufficiently so to tell his attorney that Sifundza falsely testifies against him due to the alleged burglary and dismissal. Equally certainly, his attorney would have canvassed that with Sifundza. If his usual attorney was absent and someone else stood in for him, either the same

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would apply or he would have briefed the usual attorney about it. So would Mpanza have also briefed him, if he was absent during Sifundza's evidence.

None of these happened. What the accused tries to achieve is to seek an excuse as to why Sifundza should be disbelieved. This he does by blaming his attorney, or claiming to have been unable to instruct him. But a scrutiny of the cross examination of Sifundza by Mpanza's attorney does not bear this out. Sifundza was subjected to painfully detailed cross examination by his attorney. It is liberally spiced with statements of fact, details and questions that could only have been made on comprehensive instructions by Mpanza, with the exception of his attorney's own perception of the one and only way to identify a shotgun as a particular one, namely by checking the serial number - this in the face of the unique and very obviously visible network of coloured wires tied around the stock of the shotgun exhibited in court.

The obvious absence of the two main veins of the defence of the second accused, an alibi and fabrication due to previous 'bad blood', remain conspicuous for their absence. His reasons for their absence further derogates from their plausibility.

He called the Deputy Registrar, Mrs. Thandi Maziya, to testify about the pre-trial conference. What she said was that all three accused (the present two and the witness Sifundza) were present and represented at the time, the first two accused by Mr. MJ. Dlamini.

It is common cause that this was so, further that at commencement of the hearing the legal representatives changed due to a conflict of interest by the attorney who would have appeared for both the first and second accused.

Her evidence took the matter no further.

As mentioned in respect of the first accused, it again needs to be stated that there is no obligation on an accused to prove his innocence. It is also not necessary that the court has to believe his exculpatory version for it to be found reasonably possibly true.

Having regard to the totality of evidence, I cannot find the version of the second accused to be even remotely possibly true - to the contrary, it is a manifest fabrication devoid of the truth or even the ring of truth. To come

to this conclusion his own evidence is assessed objectively and in context of how it relates to incriminating evidence against him. It is NOT a balancing of probabilities and improbabilities that leads to this conclusion.

Insofar as the consequences of a rejection of the defence versions by both accused persons go, it still does-not lead to a proposition that the crown has proven its case beyond a reasonable doubt. That has to be assessed on its own merits and the most complicating factor is whether the evidence of the two accomplices can reliably be found to be true.

The law regarding the evidence of accomplice witnesses has been stated and restated countless times in the precedents. I do not propose to burden this judgment with a repetition of the hackneyed quotations on the subject but would certainly fail in my duty if not alive to the inherent dangers in assessing their evidence.

Firstly, the evidence of both Sifundza and Shongwe is found to be credible, and plausible. I say so for the reasons that to the minutest details, bar the rare and non fatal exceptions, their evidence checked out to the fullest extent. Both are self confessed criminals, who without obvious signs

of remorse or regret candidly and dispassionately related their own part played in crimes that are beyond contemplation by any decent law abiding citizen, especially so in the case of Sifundza. But despite that, neither of the two gave any hint of trying to minimise the roles they played or embellishing the roles of their co-perpetrators.

Shongwe - the burglar - volunteered happily to help with the breaking open of the hut of Ndwandwe and carry away his safe, then to help break it open, to obtain a firearm that he knew was destined to commit a robbery, with the implicit danger that the gun may well be put to use with lethal consequences. Try as I may, I do not find any part of his evidence as implausible or incredible, any facet that hints at fabrication due to his stated knowledge as an insider.

His evidence is corroborated by a number of aspects that does not implicate the first accused. The woman who took care of him and fed him during his sojourn at the homestead of the first accused, Lucy Vilakati, independently verified that indeed he arrived in the company of a further man, whom she could not identify (he said it was Bongani). Both said that this person left soon after his arrival. Both said that this person was known

to the first accused previously. Both said that Shongwe stayed at the homestead for two weeks. Both said that Shongwe was fed by Lucy.

Regarding the burglary, Shongwe was again independently corroborated by Matibuko and the police officer, Mlangeni, on aspects that do not implicate the first accused. His evidence that the safe was carried out some distance from the hut and there hacked open at the back, was borne out by both of them. So with evidence that the safe not only contained the firearm but also the tomahawk axe with the concealed serrated knife in the handle. Likewise with the wet weather conditions at the time. Also that the lock of the door was broken to gain access.

It is aspects like this that minimise a misfinding of fact. But it also goes further.

Shongwe's evidence about the stolen shotgun and tomahawk axe is carried through and again strongly features in the evidence of Sifundza. He did not know the origin of these weapons but stated how the first accused produced it from the carry bag, giving him and Mpanza their choice between the tomahawk and the swordlike bayonet or panga. These same weapons

were identified by other witnesses as being used at the murder scene and dropped by the three fleeing suspects.

Mavuso testified that the shotgun, the tomahawk and the panga/sword were carried by three men on the run and recovered by the police after the men dropped it. The shotgun and tomahawk were positively identified by their owner, Matibuko. The serial numbers of the shotgun exhibited in court are identical to the firearm licence issued to Matibuko (exhibit "S"). This dispels any doubt as to whether it is the same shotgun or not, but the wire lacing on the stock, unique in appearance, is the common denominator used by the owner, Sifundza, and by Shongwe to identify it. The tomahawk axe is also fairly unique in its novel concealed knife in the handle, released by activating a mechanism. There is also no doubt that this same axe was stolen from the safe of Matibuko, as stated by Shongwe, later to be made available to the participants of the planned and failed robbery, whereat a person was killed. The link established by these two weapons independently corroborates the evidence of both accomplices further.

The evidence of Sifundza is that the three of them, himself, Gama and Mpanza partook in the crimes at the Mthupha homestead. Nowhere was it

suggested that any other number of persons violated, the homestead. His description of the clothing and balaclavas worn by the attackers ties in with the evidence of one victim, Albertina Mthupha.

If a critical error is sought, it would lie in the discrepancies of the trousers worn by Sifundza and Gama, also with the positions of two attackers when Mrs. Mthupha fled from the house and the identity of the person who injured her. I have given these issues careful thought and come to the conclusion that it does not have any materially destructive impact on the totality of evidence. Either Mavuso or Sifundza are mistaken about who wore which trousers, most likely Mavuso is mistaken, but it does not detract from the credibility of either. It is not a mistake of sufficient proportion to warrant either a rejection of their evidence or to cast doubt on their credibility.

The same applies to whether it was the first or second accused who injured Albertina Mathupha with the swordlike panga. In the heat and confusion of the moment it could well have been done by either of them and perceived to have been done by the other, as observed by either the victim or by Sifundza, who stood some distance away at the kitchen door.

At the moment Albertina rushed out through the kitchen door, her prime consideration was to escape to safety. If she may be mistaken as to whether there were one or two persons at the door, it does not detract from the tenor of her evidence, nor from the version of Sifundza who said he was alone at the time. The second accused might as well have been close to the door, on the inside of the kitchen, but it is not a material issue.

One further difference in versions is the place where Albertina Mthupha was when the shot was fired. According to her, she was already outside and according to Sifundza, she was still inside the house. A fact is that the shot was indeed fired, whether she was inside or outside at the time. Obviously, both witnesses cannot be correct. But again, it begs the question of whether it is so material that it is sufficient to distrust the accomplice or even Mthupha for that matter. Could this be a fabrication by Sifundza about something he did not know about, or worse still, an effort to falsely incriminate Gama or Mpanza? It is my considered view that it does not detract from his credibility or that it is a fabrication by either Sifundza or Mthupha.

The test for acceptance of the evidence of an accomplice goes further still, in that the inherent risk may be further reduced by evidence of corroboration implicating the accused directly. Here I have regard to the evidence of the neighbour Mndzawe. His evidence of the events after the crime directly involves the first accused, whom he aided and abetted by helping him to find a safe hiding place after being told that he, Gama, was involved in the killing. His actions thereafter, by taking the police to where he had left Gama, might not have been due to a sudden attack of public spiritedness, but at least it led to the arrest of the man he helped to conceal. It also links the first accused to the crime and subsequent events, corroborating Sifundza's evidence to the extent that after the crime and the police chase, the first accused managed to get away. Mndzawe falls to be branded as an accessory after the fact through his rendering of assistance to the first accused.

The evidence of Sifundza, directly linking the first accused as the man who wielded the firearm during the attack is corroborated by Mrs. Mthupha. Both of them related that the man with the gun is the one who wore a black jacket. His evidence about the man who carried the swordlike object, the

second accused, is also corroborated by Mthupha who said that she was injured with that object.

Further evidence that directly links the accused as the gunman is that of how he stole the shotgun and using it at the Mthupha homestead, as set out above, independent of the evidence of Sifundza.

The risk of error is further reduced when the accused show him-or themselves to be lying witnesses or do not give evidence to contradict or explain that of the accomplices. As shown above, neither of the accused made any positive impression as witnesses. Both failed to explain how Sifundza and Shongwe came to falsely implicate them. Both their versions are rejected as false and devoid of merit. These bare denials, coupled with afterthoughts and embellishments serve to fortify the factual conclusion that Sifundza and Shongwe are both reliable and acceptable witnesses, without the risk inherent in accepting the evidence of accomplices. The demerits of the evidence of the two accused persons are in my view, beyond question. Likewise, the merits of the evidence of the two accomplices are also in my view, beyond question and their evidence is found to be acceptable, reliable and true.

It is for these reasons that a factual finding is made that during the night of the 7th April 2000, the first accused, accompanied by Shongwe, broke into the hut of Matibuko and stole his shotgun and tomahawk axe, as alleged in count 5. Their conduct was unlawful and intentional, specifically aimed at

stealing a weapon to be used during a pre-planned robbery. Although Matibuko testified that his safe also contained money in cash, the evidence of Shongwe does not bear it out. This does not mean that Matibuko was not truthful, but it does not dispose of the burden of proof on the crown sufficiently so to justify a conviction in relation to the money as well. Matibuko places a value of E800 on his shotgun, which was not disputed and seems to be reasonable for a shotgun in that condition. He did not place a monetary value on the tomahawk, nor on the damage to the doorlock or the safe itself. Under the circumstances, to the benefit of the first accused, the conviction in respect of count five will reflect that the value of the stolen items is unknown, but in excess of E800 and not E1 500 as alleged.

In respect of the first count, murder, it is found that both the accused persons had a common purpose to rob the household of the deceased on the

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date and place alleged in the indictment. During the course of their act, the deceased was fatally shot with a shotgun wielded by the first accused. The second accused knew about the shotgun with the first accused and must have known that it could be used with fatal results during the course of their planned robbery. Yet he aligned himself with the other and willingly participated in the event, himself being armed with a lethal swordlike panga, which was also used during the rampage.

Perpetrators and co-perpetrators are those persons whose actions and intent must satisfy all the definitional aspects of the crime - See *S v Williams en 'n ander* 1980 SA 60(A) and *S v Khoza* 1982(3) SA 1019(A). The liability of a perpetrator or co-perpetrator is founded on his own act and his own intention and is not accessory as in the case of an accomplice. If it was so that the two accused persons were charged with having a common purpose to commit a robbery, there would have been no question as to the guilt of both, but that is not the question to decide. What needs to be determined if both must be convicted of the murder, based on a common purpose, or only the first accused, who did the killing, and if so, what about the position of the second accused.

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Briefly and essentially, the doctrine of common purpose provides that if two or more persons decide to embark on a joint unlawful venture or activity, the unlawful acts of the one are imparted to the other(s) which fall within their common purpose. See for instance *R v Shezi and others* 1948 (2) SA 119(A) at 128; *R v Mkize* 1946 AD 197 at 205 and *R v Duma and another* 1945 AD 410 at 415 as a few of many authorities for this position.]

Common purpose and causality are linked and in *S v Yelani* 1989(2) SA 43(A) and *S v Safatsa and others* 1988(1) SA 868(A) it was clearly held that in cases of murder a causal connection between the acts of each participant in causing the death of the deceased need not be proved.

From the facts of the present matter, as said, the purpose that the two accused persons had in common was to rob the household, not to murder, but equally, the second accused knew of the possibility that his co-perpetrator might well kill someone during their joint venture and nevertheless went ahead. It is quite clear that both accused knew of the inherent risks involved when they set out to rob money at the homestead, both armed, with the first accused having a shotgun in his hands. As

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Schreiner JA remarked in *R v Nsele* 1955(2) SA 145 AD;"... groups of criminals, one or more of whom is armed with lethal weapons should realise the extreme risks they run in embarking upon ventures that are so evil and dangerous to the community".

In fact, the first accused shot, at and killed the victim, as alleged in count 1. It cannot be held that the first accused embarked on a frolic of his own, in dissonance with their common aim and purpose. The deceased was shot in the course and scope of the robbery, with which the second accused fully associated himself with. It is therefore on an application of the doctrine of common purpose that he cannot escape liability jointly with the act which was physically committed by the first accused. Both

are equally at guilt, having wrongfully and intentionally killed the deceased as alleged in the first court.

The wording in the first count, stating the conduct to be "wrongfully, unlawfully" is tautologic - it should only read wrongful, and not unlawful as well.

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With regard to the second count of attempted, murder, it is firstly necessary to determine whether the intention of her attacker(s) was to kill her or not. According to her own evidence and especially the medical evidence recorded on exhibit "V", she had bruises on her back and thigh (or thumb). These could have been caused when she fell on the floor. She had more serious injuries too - an eight centimetre laceration of her scalp which needed suturing and moreso, a fracture of the skull. This was caused by a strike with what she called a bushknife.

From the extent of the injuries sustained it is clear that it was a severe blow with a very dangerous and potentially lethal handheld weapon. It could have killed her, but it did not. I also consider that only one blow was delivered - she said that she was struck on the head and her right shoulder, but the medical evidence does not support a finding that she received two separate blows with the swordlike panga. If indeed the intention was to kill her, more than one blow would have been inflicted on her as she was left alone after being questioned, following the first and only blow.

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I therefore cannot conclude that her assailant attempted to kill her as alleged, but rather that the intention was to cause serious bodily harm, when she was hit.

There is an anomaly in the evidence as to who actually hit her. Mrs. Mthupha said that the one who held the bushknife told her to lie down and that the one with the gun came and pointed her with it. Then, the one with the bushknife struck her, then the one with the gun asked her about Lucky Ginindza. As found above, the person who had the shotgun was the first accused while it is the second accused who had the bushknife, at the time of the attack. A different view of this event was that of Sifundza, who observed it from the kitchen door. His evidence is that it was the first accused who hit Mthupha with the bushknife after he took it from the second accused.

I therefore find that it is not determined beyond reasonable doubt as to which of the two accused actually hit the victim, but it does not dispose of this count. Both accused at that time shared the common intent and purpose to rob the household of the victim. She was hit to extract information from her which would enable them to make off with the money that they came to

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rob. On an application of the doctrine of common purpose, it does not matter which of the two assailants caused the blow to her head. The act of the one is imparted to the other.

Accordingly, both accused are found to have assaulted Albertina Mthupha with the intent to cause her serious and grievous bodily harm, instead of the more serious charge of attempted murder as per the second count.

With regard to the third count, levied against only the first accused, his attorney argues that he should be acquitted because he was not asked by Mavuso to produce his licence for the shotgun but failed to comply with the demand. This line of reasoning fails to have regard to the statutory requirement of licencing firearms. Under the laws of some jurisdictions, there is legislation that requires a person to produce every firearm that is licenced in his name when required to do so. That is a different position from the one at hand. The legislation at hand requires that every firearm in Swaziland be licenced to an individual, save for certain exceptions, like police officers and soldiers.

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It is common cause, as held above, that the shotgun that was used by the first accused during the

attack is licenced to its lawful owner, Matibuko, from whose possession it was stolen by the first accused and his helper, Shongwe. It would be a fallacy to acquit the accused on the ground advanced by his attorney, namely that the requirement is that the police were to ask the accused for his licence and only if he failed to produce it, could a conviction be considered.

Whether he was asked for his licence or not is not the issue. The issue is that he had a shotgun in his possession which he stole from its owner. It is licenced in the name of Matibuko (see exhibit "S") and not of Gama. The accused was not the holder of a valid licence or permit, as required of any lawful possessor, save for those excepted by statute, like police officers with official service arms for instance.

The firearm mentioned in count 3 is one and same as the one stolen from Matibuko, with the serial number reflected in exhibit "S", Matibuko's licence for a single barrel 12 bore shotgun. The crown has discharged the onus of proof sufficiently to warrant a conviction.

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The same does not apply to the fourth count relating to unlawful possession of a live round of ammunition. During the trial, Mavuso handed in exhibit "T" - a single 12 bore "Swartklip" shotgun cartridge marked as being No. 5 shot. From my own observation that the primer has not yet been indented and that the red cardboard casing is still folded as done in the factory, coupled with the familiar weight of a live shotgun cartridge, I have no hesitation at all to personally know that the cartridge is indeed "live". But, as stated earlier on, the court cannot enter the arena and double as witness, using its own personal knowledge. My own knowledge and experience of firearms and ammunition cannot be elevated to the extent of taking judicial cognisance of the status of ammunition.

The crown adduced no evidence as to the status of the round of ammunition. Mavuso could easily have done the task. Perhaps the need of proof was overlooked when the serviceability of the shotgun was admitted. Be that as it may, the crown conceded that it failed to discharge the onus of proof in respect of the fourth count and the benefit of that has to pass onto the first accused.

Accordingly, the verdict of the court is ordered as follows:-Count 1 (Murder) Both accused one and two: Guilty.

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Count 2 (Attempted murder)

Both accused one and two guilty of assault with the intent to cause grievous bodily harm (not guilty of attempted murder).

Count 3 (a contravention of section 11(1) of Act 24 of 1964 – unlawful possession of a firearm)

Accused 1: Guilty

(Count 4 (a contravention of section 11(2) of Act 24 of 1964 - possession of ammunition without a licenced firearm)

Accused 1: Not guilty

Count 5: Housebreaking with the intent to steal and Theft.

Accused 1: Guilty. (Value of stolen items unknown, but in excess of E800)

Further proceedings in respect of sentence stand adjourned to a date to be arranged by the Registrar, in consultation with counsel and the court. Both accused are to remain detained in custody.

In respect of the two witnesses introduced and heard as accomplices, it is recorded in accordance with the provisions under Section 234(2) of the Criminal Procedure and Evidence Act, 1938 (Act 67 of 1938) that both Sibusiso Ndathane Sifundza and Dumisane Shadrack Shongwe fully

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answered to the satisfaction of the court all questions lawfully asked of them while under examination and that each of them are absolutely freed and discharged from all liability to prosecution for such offences as to which they testified of their participation therein.

JACOBUS P. ANNANDALE

ACTING CHIEF JUSTICE