

IN THE HIGH COURT OF SWAZILAND

CRIM CASE NO 27/02

BEV

AND

DUMSANE VINCENT D LAM INI
CELIMPHILO MICCAH DLAMINI

1ST ACCUSED
2nd ACCUSED

CORAM FOR
CROWN FOR
ACCUSED

K.P. NKAMBULE-J S.
FAKUDZE M.
NXUMALO

JUDGEMENT 25/11/04

The accused person is charged with murder.

The crown alleges that upon or about the 8th March 2001 and at or near Nisela Farm, Big Bend, in the Lubombo Region, the said accused each or all of them acting jointly and in furtherance of a common purpose, did unlawfully and intentionally kill one Thulani Tsabedze.

Accused No. 2 who was released in terms of Section 136 of the Criminal Procedure and Evidence Act could not be located. In the interest of justice separation of trials was ordered.

The accused pleaded not guilty to the charge. The crown called four witnesses to prove its case.

PW1, Eman Mangaliso Mahlobo told the court that he was employed by Nisela Farm in 2001 as a security guard. This was before he emigrated to the Republic of South Africa where he is presently employed.

On Wednesday 8th March 2001 PW1 was working a night shift together with Thulani Tsabedze, the deceased. According to PW1 they were detailed to patrol the road adjacent to Nisela Farm (from Nisela gate to Mabhodweni area). At about 12 midnight whilst from Mabhodweni and before reaching Nisela they saw three gentlemen approaching from the right side of the road. Before they reached the gentlemen moved on their (PW1 and the deceased) side of the road. As they moved from the distance PW1 could not identify any of them. But as they drew closer and changed to the left side of the road PW1 could positively identify Accused No. 1 as there was moonlight. According to PW1 Accused No. 1 came direct to him and then grabbed him by the arm. He saw and recognised him as they talked. According to PW1 he had known the Accused for a year.

As the Accused grabbed PW1 he then directed his two companions at the deceased saying, "This is the man". Accused then pulled PW1 to a distance of fifty metres away from the three.

According to PW1 one of the Accused companions was carrying an axe, which he produced in court as an exhibit. The two attacked the deceased. Accused ordered PW1 not to mention anything regarding the incident. He threatened him that if he reported the incident he would be killed as well. The Accused ordered him to go and report that the deceased had been knocked down by a car. According to PW1 he went to the station at Nisela and reported as he was ordered by the Accused. At the station he found a certain Ndlangamandla who was on guard. He reported that Thulani, the deceased had been knocked by a car. Personnel from Nisela went to the scene of crime. Police came at the scene of crime. They questioned PW1 regarding the accident. The deceased was taken to the mortuary.

According to PW1 he eventually told one Titus Dlamini, a security officer, what had happened. He was transferred to Mbabane at Buffalo Soldiers. On the following Monday he went to Big Bend Police Station where he found two police officers. He related the true story.

The crown then called PW2 No. 677 Inspector Simon Simelane now retired. He told the court that in 2001 he was stationed at Siteki Regional Office under Criminal Investigation Department and in Murder and Robbery Department. On 3rd April 2001 he received a phone call from Nisela Farm. The telephone call was from Mr. Forbes the manager of Nisela Farm. He in the company of two officers proceeded to Nisela.

On arrival there they found Mr. Forbes the manager and a Mr. Shongwe who was in charge of security at Nisela Farm. He received information regarding this matter and then started his investigations.

From Nisela Farm they proceeded to Big Bend Police Station where they found PW1. As a result of the information he received from PW1 he returned to Nisela Farm where he arrested the Accused before court. According to this witness the Accused gave him an axe, a pliers and a knife. These items were handed in court as Exhibits No. 1, No.2 and No. 3 respectively. Nothing more was said by the witness regarding these exhibits. He then charged the Accused for murder.

The crown then called PW3 Dr. R.M. Reddy, the medical doctor who conducted the post mortem examination on 20th March 2001. The doctor produced a medical report which was entered as Exhibit 'A'. The doctor concluded that the cause of death was as a result of head injuries. Under cross-examination he revealed that the injuries are consistent with blunt force. According to PW4 1581 Sergeant A. Phakathi he was on duty on the 8th March 2001 at about 10.00 p.m. when he received a report regarding this matter. He proceeded to Nisela Farm and along the Big Bend/Lavumisa road he found the body of the deceased. He took the body and conveyed it to Matsanjeni Health Center.

At the close of the crown case the Accused was brought to his defence. The Accused gave evidence in his defence under oath. He told the court that on the day in question he was from work after he had knocked off on the day shift at 5.00 p.m. He went to his place of abode. From there he proceeded to his wife's quarters where he spent the night. According to Accused he got to his wife's place at 7.00 p.m. In the following morning he reported for work. This is when he got to know of the passing away of the deceased.

According to DW2 Thembi Mamba, the wife of the Accused, Accused was on a day shift on the 8th March 2001. He knocked off at 5.00 p.m. This witness told the court that she met the Accused immediately after work at around 5.30 p.m. The Accused told her that he was heading for his place of residence. However, she realised early in the morning that the Accused was in the house. She was not aware when he came in. In arguments Mr. Fakudze argued that the crown has proved its case beyond a reasonable doubt. He stated that the crown has led the credible and reliable evidence of four witnesses. The court was urged to reject the evidence of the Accused that he was not on duty at night when the incident took place.

Mr. Nxumalo for the Accused submitted that the crown has failed to discharge its onus of the burden of proof. He stated that the crown has not been able to prove the following points.

a) Identity of the Accused:

He stated that the identity of the Accused was in doubt. The witness told the court that the incident happened during the night in the darkness.

b) Evidence of a Single Witness:

Mr. Nxumalo stated that Section 236 of the Criminal Procedure and Evidence Act allows the court to convict on the evidence of a single witness. He however pointed out that such evidence should be credible. He stated that the evidence of PW1 cannot be trusted. He pointed out that it was clear that when PW1 said the Accused was on duty on the day in question he was not telling the truth. Also the

two versions of his story as an eyewitness renders him to be an untrustworthy witness.

c) Exhibits No. 1, No.2 and No.3:

Mr. Nxumalo also submitted that the post mortem report stated that the injuries were inflicted by a blunt object, not one of the exhibits before court could have inflicted the kind of injuries as seen by the doctor on the body of the deceased.

The evidence which directly implicated the Accused person with the commission of the offence is the evidence of the eyewitness PW1. who says he saw the Accused person with two others approaching from a distance. Accused then went straight to him and then grabbed his hand and pulled him to a distance of Fifty metres away. Accused then pointed at the deceased and said "This is the person" telling his two companions who suddenly moved towards the deceased assaulting him.

This witness stated that the Accused ordered him not to tell anyone what had happened and that if he did he would be killed as well. The Accused then told him to go and report that the deceased had been knocked down by a car. This is what was reported by PW1 to the security office at Nisela Farm. After much thought PW1 decided to tell the truth.

One cannot understand, however, why PW1 told lies and said the Accused was on night duty on the day in question. The evidence of Thembi Mamba clearly points out that the Accused was working in a day shift on the 8th March 2001. There is no reason to doubt the evidence of this witness. She was a credible witness. If she was untrustworthy she should have easily told the court that the Accused was at her place the whole night. She, however, told the court that when she went to bed the Accused was not at her place having told her that he would be spending

the night in his own flat. She was surprised to see him seated in her room in the early hours of the 9th March 2001 at around 4.30 a.m.

The question is why would PW1 lie and say the Accused was on night shift on the day in question.

It is clear from the foregoing that the evidence of PW1 cannot be trusted. In **L.H. Hoffman and D.T. Zeffert**, The South African Law of Evidence (3rd ED) at page 409 the learned authors cite the authority in the case of **Rex Vs Difford** 1937 AD 370 at page 373 where the following was stated:

"No onus rests on the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true then he is entitled to his acquittal".

I find that in the instant case the inconsistencies in PW1's evidence goes to his credibility as a witness. Therefore he is not to be believed.

In the circumstances of this case and for the foregoing reasons and conclusions I find that the crown has not succeeded in proving its case beyond reasonable doubt. In the result the Accused is found not guilty of murder. He is accordingly acquitted and discharged.

K.P. NKAMBULE

JUDGE.