

IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Criminal Trial No. 35/04

In the matter between
REX

versus

DOCTOR MNISI AND
BONGANI SIFISO NKAMBULE

Coram

J.P. Annandale, ACJ

For the Crown

Mr. S. Fakudze

For Accused No. 1

Mr. Simelane

For Accused No. 2

Mr. C. Ntiwane

JUDGMENT 20
April, 2006

- [1] In this matter the two accused are indicted with the crimes of Murder and Theft of a Motor Vehicle, both offences alleged to have taken place on the 23rd June 2003 at Ndzingeni area. Also, both crimes are alleged to have been committed with a common purpose, a joint wrongdoing that could be either premeditated or acceded to at the time whereby the wrong of one person is attributed to the other according to this doctrine.
- [2] Both pleaded not guilty to these crimes which placed an *onus* or a burden of proof, to prove their guilt beyond reasonable doubt, on the crown.
- [3] Initially and up to the stage of the trial when the crown's case was closed, the matter was before the late Shabangu, AJ. He then tragically passed on with the part-heard trial unfinished. Every accused has the right to hear a judgment on his plea to a criminal charge. Under these circumstances two avenues prevailed. (A) A trial *de novo*, with all the evidence, pleas etc to be heard all over; or (B) In terms of Section 291 (bis) of the Criminal Procedure and Evidence Act of 1938, (Act 67 of 1938) (the Act), the matter could be continued with before another court, from the stage where the proceedings have ended.
- [4] A transcription of all recorded proceedings up to the time that the late Shabangu AJ postponed the matter for hearing of the defence case was made available to this court to acquaint itself

with what the initial presiding judge had heard. When the matter first came before me the second accused obtained a postponement to engage and instruct new counsel following firstly, the withdrawal of his counsel Advocate Percy Mngomezulu, who did not seek and obtain leave of court to do so. Also, whichever firm of attorneys engaged the services of Advocate Mngomezulu, they did not file any letter of explanation of his absence. Secondly, at the first appearance before this court, the attorney who would have appeared, Mr. S. Mngomezulu, said that he was not properly instructed by the 2nd accused and he also was not *au fait* with the transcript of proceedings. The second accused having obtained a postponement to the following day then had appearing for him attorney Ntiwane. At the onset, the court established from both Mr. Ntiwane as well as Mr. Simelane and with the concurrence of their respective clients, that both accused agreed that this court should proceed with the matter as is provided for under Section 291 (bis) of the Act, instead of having the matter commence *de novo*.

- [5] From the transcription of the proceedings before the late Shabangu AJ, the evidence of five witnesses is recorded and there is also a substantial number of formal admissions recorded by the then legal representatives of the two accused persons. Both accused pleaded not guilty to both counts and their pleas were confirmed by their legal representatives.
- [6] Under the provisions of Section 272 of the Act the crown handed in, with consent of the attorneys, a report of the *post-mortem* examination which was conducted on the deceased,

who is mentioned in count one being Mr. Jeremiah Ndlangamandla. The Pathologist recorded his findings on Form SCI2 from which it appears that there were some injuries to the deceased, notably wounds in his head and chest. The finding of the pathologist is that the deceased died due to firearm injuries in the head, skull, brain, lungs and heart. These injuries, it is common cause were caused by two bullets. That is contained in exhibit "A".

[7] A second documentary exhibit, number "B", was also handed in by consent. That is a statement made to a judicial officer, Her Worship Magistrate Hlophe, which statement was recorded on the 2nd July 2003 by one Bongani Sifiso Nkambule. He is the second accused in this matter. The contents of the statement and the admissibility thereof is not in issue. I will revert to the contents of this statement further down again but in essence it is in line with the explanation given by the second accused in the course of his own evidence in chief.

[8] Further documents that were handed in to become evidence are the following. Firstly, as exhibit number "C", a forensic laboratory report made by an expert in the field of ballistic examination and forensic analysis of firearms and ammunition, Captain Goodwin Tebogo Motsepe of the South African Police. He examined a 9mm Parabellum pistol and a spent 9mm bullet. The bullet was extracted from the deceased by the pathologist. He examined the firearm and found it in good working order. He also examined fired cartridges which were found on the scene. The upshot of these examinations were that he could state that in his expert opinion, the bullet which he examined was fired by the firearm which he examined. It is common

cause that the firearm belongs to one of the accused persons and from the pathologist's report it is also clear that the death of the deceased was caused by gunshot wounds, one bullet having been extracted by the pathologist, examined by the ballistic expert and found to match the firearm of the accused person, to which I will revert later.

[9] Further, also handed in by consent, are motor vehicle registration documents of an Audi 100, registered in the name of A.P. Mbhokane of Ermelo in Mpumalanga, formerly the property of one M.J. Otto. It is a motor vehicle with registration number VZH 123 MP. Those documents were exhibits "D" 1, 2, 3 and 4. It was also recorded that this motor vehicle is the same one that was driven by the first accused and which motor vehicle was in possession of the deceased prior to the incident. After the admission of the documentary exhibits the court then heard *viva voce* evidence of a number of witnesses.

[10] The first of these is the wife of the deceased, Mrs. Sithole. Her evidence is to the effect that soon prior to the date of the killing in Swaziland, her husband left South Africa in the company of another person to come here and that in the past, these men came to Swaziland to buy dagga. When they left South Africa they travelled in the white Audi sedan which was later shown to court, bearing registration number BZH 123 MP. She also testified that in the past motor vehicles were exchanged for dagga. She further testified that she had met, sometime in the past, one of the two accused persons namely Doctor Mnisi, the first accused. She met him in the company of her late husband. Her further evidence is that in Swaziland, she identified the deceased as her late husband. At the time

when she identified the deceased she saw what she thought to be bullet holes in the body.

[11] The next witness called by the crown was Mr. Daniel Papo, a neighbour of the deceased who accompanied the deceased to Swaziland in the white Audi motor vehicle. However, PW2 was not able to enter into Swaziland due to problems with his passport. He spent the night somewhere else. He later contacted the wife of the deceased and found out that the deceased had not returned from Swaziland. He later again came to Swaziland and inside this country he saw the vehicle that the deceased was using previously. At that time the vehicle was driven by the first accused. Thereafter the police were contacted and this witness was to show them where he had left the deceased and told them what he knew about him.

[12] Also, his evidence was to the effect that inside the vehicle there was a bag containing a leather jacket, torch, and plastic bags, which items he was later shown. He identified it to have been the same items left in the vehicle which was driven by the deceased at that time. The plastic bags were to be used for dagga to be placed in them, prior to it being taken back to South Africa.

[13] The third witness for the prosecution was Detective Sergeant Mfanasibili Dlamini. He is a Police Officer in the Royal Swazi Police Serious Crimes Unit and he investigated this matter. He related his evidence in court as to how he found the 1st accused at the Mbabane Police station, cautioned and charged him in this case after which the 1st accused, Doctor Mnisi, was taken to Matsapha where he showed him a white Audi sedan

motor vehicle. This vehicle, it is common cause, is the same one that was used by the deceased when entering Swaziland. Thereafter, it was driven by the 1st accused and he was seen by PW2 when he was doing so. The same vehicle is the one that he took the investigating officer to at Matsapha.

[14] The 1st accused also took him to his homestead where he gave him the Eveready torch, which is the same torch that was identified by PW2 in his evidence as being the one that was left in the vehicle of the deceased when he came to Swaziland.

[15] Sometime later, this witness went to the 2nd accused and he also arrested him in connection with this matter, cautioned and charged him. From the 2nd accused he received a 9 mm pistol which is the same pistol that was examined in South Africa by the police expert whose evidence is contained in exhibit "C". Captain Motsepe gave a full description of this pistol, it being a 9mm Parabellum Norinco with a specified serial number. He also received from the second accused the leather jacket and the bags which were also said to have been left in the vehicle as related by PW2 and later on identified by himself.

[16] His further evidence concerns a statement made before a Magistrate, to which I revert further down.

[17] The firearm that the investigating officer obtained from the second accused is licensed in the name of the second accused with the relevant documentation shown to the trial court as exhibit No."E". There are also the other items that I have

mentioned, the pistol, magazine, bags, torch, leather jacket etcetera, which were likewise admitted by the trial court as exhibits herein. The motor vehicle itself was also indicated to be an exhibit. This court, at the conclusion of the trial when it was resumed before me, also had a look at the motor vehicle, a very dilapidated old model Audi 100 with more rust than paint, clearly and visibly not of much commercial value.

[18] The next witness called by the crown, PW4, was Dr. Reddy, the Police pathologist. He testified about the postmortem examination that he conducted on the deceased. The injuries were described as being bullet wounds, at least two of them. He recovered the spent bullet from the chest of the deceased, which bullet was later involved in the forensic examination. There was an issue as to whether exhibit "A", the *post-mortem* report which was handwritten and recorded on a form, was indeed the one recorded by the doctor. In the course of his evidence, it was agreed that indeed the contents of the report together with the evidence of Dr. Reddy can be taken as a given issue.

[19] Lastly, PW5 Inspector Methula testified in this matter about the discovery of the body of the deceased. Acting on a report, he went there together with other police officers. They found the deceased, wounded on the chest and in the head. He also found there, on the side of the dead body, a small pocket knife. Motor vehicle registration papers of the vehicle BZH123MP were also found. Photographs of the body were then taken. I will refer again to the knife further down. The photographs referred to were also handed in by consent.

[20] This evidence which I have referred to above, is a short summary of the state's case against the two accused. Many issues of common cause are set out above. It was at the stage when the crown closed the case for the prosecution and when the matter was postponed by the late Shabangu AJ and which matter later recommenced before this court, that the evidence up to this stage was agreed to by the legal representatives, in consultation with the accused, to be considered by this court. It was also common cause that none of the evidence would require crucial findings as to the credibility of a particular witness. It would have placed this court in a predicament by not having seen and heard the witness at first hand. But as said, the evidence is not controversial in so far as credibility of any particular witness goes. Hereafter each of the accused chose to give his own evidence under oath and that evidence was heard by this court.

[21] In his own evidence, the first accused who confessed to be a dagga grower who makes a living through selling dagga, says that in the past he has dealt with the deceased. He provided him with dagga in exchange for cars. He says he has previously received motor vehicles from him, a Mitsubishi bakkie and a Ford sedan in exchange for dagga. Around the time of the incident the deceased again came to him wanting to obtain some dagga. He was driving the white Audi vehicle that is the subject matter of the second count. The Audi was given to him by the deceased as payment for dagga previously received from him. They then made the necessary arrangements.

[22] The deceased asked that once he has his dagga, he be given a lift to Pigg's Peak from where he would get a taxi to take him back to South Africa. The dagga would be fetched from a hiding place where he kept his stocks and the deceased said that he would pay him for the transport. His evidence is that he then agreed to this. He used some of his own money to put petrol into the car and the two of them drove off, not directly to get the dagga but instead first to go to his cousin, whom he refers to as his brother, the second accused. There are various reasons for which he wanted the second accused to go with him, mainly to have a motor mechanic in case the vehicle broke down since he was not at ease that the vehicle would make the journey unimpeded. He also did not fully trust his customer. He says that during the course of the journey the vehicle did in fact break down and the second accused had to effect some repairs. The three of them then spent the night at the house of the cousin and the next morning they set off to go and fetch the dagga. It is on the way there that the second accused and the deceased both took some alcoholic refreshments and again they bought alcohol later in the day. The deceased had a bag with him. Without him seeing the contents thereof, it apparently is the bag that contained the leather jacket, torch, plastic bags etc. From Pigg's Peak the three went further towards Ndzingeni area where the dagga was to be fetched and by this time the deceased and the second accused were intoxicated.

[23] They arrived at the area where the dagga was kept at around midnight and he used the torch belonging to the deceased to go into the bush where he fetched the bags of dagga. At that stage, he says, the other two were still drinking. He returned

and two bags of dagga were then placed in the boot of the car and a further two bags of dagga in the interior. However, that is when the problem started that led to the further events since when he asked the deceased for money to pay him for the additional dagga, with the white vehicle already being used to pay for previous dagga, a tiff then arose between the two and it resulted in quite some argument.

- [24] According to him, the deceased then became aggressive and an altercation between the deceased and the second accused caused the problem that resulted in the death of the South African dagga dealer. He says that he saw the deceased pull his brother, as he refers to his cousin, by the jacket and that he himself took refuge behind the second accused and that he then ran off to the vehicle.

At that time he heard the sound of a gunshot as he was trying to get into the vehicle. He says that he was not aware that the second accused had his firearm with him at that time. The statement by the second accused indicating otherwise insofar as a firearm is concerned is not evidence that is admissible against the first accused.

- [25] He then wanted to leave the place as fast as possible and the second accused also got into the vehicle and they left the deceased behind but they were not aware at that time that he was fatally wounded. In cross examination he conceded that two shots were heard by him which he presume had been fired by his co-accused. Part of the reason why he wanted to get away as soon as possible was because of the dagga in the vehicle and fear of being caught with it. Further, that he considered the deceased to have been the aggressor in the

fight and that the fight was fuelled firstly by excessive intake of alcohol and secondly with the deceased becoming aggressive when he was asked to pay for the dagga.

[26] He was adamant throughout his evidence that the Audi vehicle was given to him by the deceased in exchange for dagga previously sold and delivered to the deceased. Further, that it was not the first time that the two of them followed that procedure, relating the same scenario in respect of two previous vehicles. Although he and the deceased had previous dealings he was not fully trusted by the first accused and he was apprehensive of a sour relationship that might arise during the course of the dagga dealings. He also says that when the first shot was fired he was still behind the second accused, and that the second one was fired whilst he was on his way to the motor vehicle.

[27] He also has it that he had been driving this vehicle throughout the events. Although it was brought to him by the accused, he was driving it himself since ownership had already passed on to him and that at no stage he intended to steal the car, nor that he in fact stole the car. He testified that he received it from the accused prior to his death as payment in a dagga transaction even though the transaction was unlawful.

[28] In so far as the murder charge against him goes he explains that he was not aware that the second accused was armed with a pistol. Further, that the deceased became aggressive and that he tried to get away from him when attacked. The second accused was also in danger at the time. He also says

that he did not think that the victim was fatally wounded and that if he was, which is so, then he had no desire for him to be killed.

- [29] The evidence of the second accused, Mr. Nkambule, ties in with that of the first accused in so far as their joint presence goes. For purposes of summarising his evidence, I am not going to quote extensively not from his *viva voce* evidence, but rather from the statement that he made to the judicial officer. The statement was admitted by consent. This statement is in essence the same as his own evidence. I quote from exhibit "B":

"On 22/06/03 I was at Mvutjini at home. Doctor Mnisi arrived with a guy from Johannesburg. We were watching movies, they spent the night at my place. Then at about 4 pm they asked me to accompany them to Pigg's Peak. I lent the guy from Johannesburg E100.00. I took my gun with me as we were going to a distant place. At Sidwashini the driver bought 2 beers. We were using an Audi Sedan. Then in Pigg's Peak they made phone calls. We then proceeded to Ndzingeni. When we reached Ndzingeni they parked the car. Doctor Mnisi then said I should accompany him. The driver remained in the car.

When we returned to the car Doctor said I must help him as the driver had been robbed in Johannesburg he could cheat him in the deal. He said I should shoot the driver if anything happened. I eventually agreed. He promised to give me money. I told him that I was not happy with the arrangement. Then we returned to the car. We found the driver at the back seat of the car. Then we went away.

The guy opened the boot before we took off. He had initially sat at the backseat of the car. I did not trust him. We then parked the car in the bush. We went down the hill as they said that is where their deal was. We entered a bush and they searched in the bush for a while then an argument ensued.

The guy from Johannesburg then put his hands in the pockets. Doctor then came to me, I got scared. I then pulled out my gun and shot him. I was disturbed as he had a knife in his pockets. I shot him twice the second time I shot him in the head and near the heart. Doctor then searched his pockets. He took his wallet. There were only coins in his wallet. Doctor took out a torch from the guy's pocket.

We then started going away using the car. Doctor then threw away the torch and cartridges. Then I asked Doctor what would happen. He then dropped me at my place. He slept at my place and he left the following morning. He gave me a jacket before he left as a gift.

Then last Friday police came to my place looking for Doctor. I told them that he had left in the morning. Then on Sunday in the evening the police arrived at my place and took me to the police station. I was then asked for the gun. I took them back to my place and gave it to them with its licence. I was then detained until yesterday. I was taken out of the cells and questioned about this case.

I was then brought to court. I told the police what had

happened as it was the truth."

[30] The evidence of the second accused is thus as quoted from the statement that he made and it was amplified to some extent in his oral evidence and under cross examination. The essence thereof is and remains that he assisted the first accused who was in the presence of the deceased to travel with him to give technical support in case of a breakdown. He did have to make some repairs in the course of the journey. He and the deceased were drinking and they started quarrelling at the scene and especially so at the time when the first accused went off into the bush to fetch the dagga. He confirms that when the deceased was asked for money to pay for the dagga he then turned onto them, aggressively so, and that he then physically attacked the second accused. At that stage he says the first accused took refuge behind him.

[31] At the crucial moment when he feared to be overcome by the deceased, he saw the deceased taking a knife from his pocket and in fear of his own life he then produced a pistol which he had on his side and shot at the deceased. He thereafter on fired another shot at the deceased.

[32] The crucial issue in this trial, in so far as the murder charge goes, is whether the two accused persons have been shown to act with a common purpose, showing a joint intent to kill him. From the evidence, I have severe reservations as to whether this has been proven. The only indicator of a possibility of a common purpose is that the two accused were at the same time and same place in the presence of the deceased and that

they did partake in an unlawful expedition in so far as the dagga goes.

[33] Our law does not recognise as valid or proper the doctrine of *versari in re illicita*. This doctrine imputes on persons involved in or during the committal of an unlawful enterprise, a further wrongdoing, which is a result or a consequence of the first wrongdoing. In other words, according to this doctrine, because the accused were busy with an unlawful dagga transaction and in the process thereof the deceased was killed, they would therefore on strength of the doctrine of *versari in re illicita* also be held liable on that basis. But that is not the case.

[34] The factual situation before court is namely that while they were at the place an altercation broke out between the deceased and the second accused and it is in the course of that altercation that the second accused produced a firearm and fired the fatal shots. The real question that needs to be decided is whether the second accused, when he fired the fatal shot, had the wrongful intent to kill Ndlangamandla. The only evidence that is before this court concerning the event itself is the version given in court by both accused.

[35] Their joint version is that Ndlangamandla was the aggressor, that he was threatening to both of them, that the first accused was scared enough to try and hide behind the second accused, that the deceased had already clearly indicated to both that he would have nothing of them and that he would use violence towards them, and that at the crucial moment he then produced a knife. This knife is not a figment of imagination.

When the second police officer went to the scene of the killing he found the knife to be there with the deceased.

[36] From what is before me, it rather seems that instead of the second accused having had the wrongful intent to deliberately kill the deceased, he mistakenly thought that he acted in self defence. According to the evidence the attack on him was not of such proportions and dimensions that it justified a killing of the aggressor.

[37] The second accused, in my considered view, exceeded the bounds of self defence. It was not necessary for him to go to the extent that he must fire a fatal shot at Ndlangamandla. It is unknown whether it is the first or the second shot which caused the death. In the event that only one shot was fired it still would have resulted in the same finding made by the court, namely, that the second accused, when he shot Ndlangamandla, did not have the unlawful intent to kill him which would have resulted in a conviction of murder. Rather, he mistakenly thought that he was acting in self-defence. The circumstances does not justify an acquittal on the grounds of self-defence, giving him justification to do so. The second accused, when he shot the deceased, certainly exceeded the bounds of self-defence. It thus entitles and compels the court to enter a conviction of Culpable Homicide.

[38] In so far as the first accused is connected with the murder charge, the only evidence is that he was present and that when the first shot was fired, he was already in the process of distancing himself from the two, making his way to the car.

When the second shot was fired he was even further away. He had no desire or intent to get Ndlangamandla killed. He is not associated with the killing to such an extent that he must even be convicted of aiding or abetting the killing. Therefore, the first accused, in my considered view, must be acquitted of the murder charge.

[39] The second count, relating to the theft of the motor vehicle, must result in the acquittal of both accused. As I have mentioned above, even though the first accused obtained the vehicle by unlawful means in that he exchanged it for a number of bags of dagga as he has done in the past, it does not equate to theft. No unlawful *contractatio* or unlawful taking of the vehicle from the possession of the owner is supported by the evidence to make such a finding. What the evidence does support is that the deceased willingly and knowingly, as he has done in the past in respect of other vehicles and in respect of other bagsfull of dagga, willingly and knowingly handed over the vehicle into the possession of the first accused. The first accused then drove the vehicle with Ndlangamangla as a passenger in it. The passenger Ndlangamandla gave him the vehicle in exchange for dagga. He contracted with him to fetch four bags of dagga which he would pay for, after which the first accused would have taken him further to Pigg's Peak where he would then have taken a taxi to go home or make alternative arrangements. The second accused had nothing more to do with the vehicle than being a passenger or mechanic.

[40] It is the finding of the court that the vehicle was unlawfully and improperly obtained by the first accused but not also that he

stole it from the possession of Ndlangamandla. For these reasons the court will further order at the end of the matter that the vehicle is to be forfeited to the state to be destroyed. The manner in which the first accused obtained the vehicle is not compatible with proper lawful possession by him. More importantly, it was knowingly used by the accused to convey an illegal consignment of four bags of dagga. But that he stole it cannot be the case and therefore the judgment of the court is recorded and ordered as follows:-

COUNT 1

Both accused are acquitted of murder but the 2nd accused is convicted of culpable homicide.

COUNT 2

Both accused are acquitted and discharged.

The court will, after handing down of this judgment, discharge the first accused and continue with proceedings on sentence in respect of accused number two in count 1, i.e. Culpable Homicide.

J. P. ANNANDALE, ACJ