



**IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE No. 216/2010**

In the matter between:

**THE KING**

**VS**

**JABULANI CYPRIAN MSIBI**

**THULANI SAMUEL MSIBI**

Neutral Citation: Rex vs. Jabulani Cyprian Msibi (216/2010) [2012] SZHC  
23  
(13<sup>th</sup> March 2012)

**CORAM: SEY J.**

**Dates heard: 28, 29 February 2012 and 7 March 2012**

**Date of Judgment: 13 March 2012**

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**JUDGMENT**

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**SEY J.**

[1] The accused **Jabulani Cyprian Msibi** is charged with the offence of contravening Section 80*bis* (1) (c) of the Crimes Act 6 of 1889 as amended or in the alternative violating a grave.

[2] In the Indictment dated the 5<sup>th</sup> day of July 2010, the accused had been jointly charged with one Thulani Samuel Msibi. However, by virtue of a Court Order dated the 3<sup>rd</sup> day of February 2011, a separate trial was ordered for this accused pursuant to the provisions of section 170 of the Criminal Procedure and Evidence Act 67/1938.

[3] The Crown has alleged that in the month of December 2007, and at or near Mdzimba Mountains in the Hhohho region, the said accused each or both of them acting in furtherance of a common purpose did unlawfully with intent to remove or extract parts of human body mutilate or dismember a human body of an unknown deceased person.

[4] The accused person pleaded not guilty to the indictment. In support of its case, the Crown led the evidence of six (6) witnesses and at the close of the Crown's case; the accused gave evidence under oath and called no witness.

[5] PW1 was Fikile Nhlabatsi, a Judicial officer stationed at Manzini Magistrate's Court. She testified that on 6<sup>th</sup> February 2009 she was on duty at around 15:15 p.m. when the accused was brought to her

at the Manzini Magistrate's Court to record his statement. PW1 said she introduced herself to the accused as a Judicial Officer stationed at Manzini Magistrate's Court and that she also introduced Pretty Nxumalo as a court interpreter. PW1 went on to state that she then cautioned the accused and informed him that he was not obliged to say anything unless he wished to but whatever he said would be recorded in writing and might be used in evidence at his trial. The accused then chose to say something which PW1 recorded in the SiSwati language and it was translated into the English language by the interpreter. The said statement before the Judicial Officer together with Annexure "A" were tendered without objection and admitted in evidence as Exhibits A and B respectively.

- [6] In cross-examination, the accused in essence alleged that he was never told by PW1 that she was a Judicial Officer. He said he thought PW1 was one of the police officers and not a Magistrate and that he had made the statement because he was afraid that the police would have assaulted him if he had refused to do so. However, PW1 told the Court that she had no doubt that the accused knew he was at the Magistrate's Court and that she had introduced herself as a Judicial Officer and that some of the questions she had asked him concerned police officers. PW1 further stated that no police officer was present when she was recording the statement. She said that after taking the name and surname of the police officer who had brought the accused, she had told the officer to move away from the area near her chambers. Moreover, PW1 said that the accused had

told her that he was never assaulted by the police so he cannot now say that he was afraid he would have been assaulted by the police.

- [7] PW2 was Pretty Nxumalo who testified that she is a court interpreter based at Manzini Magistrate's Court. She confirmed that on the 6<sup>th</sup> day of February, 2009 she was the interpreter who was present in the chambers of PW1 when the latter was recording a statement from the accused in SiSwati. She told the Court that before recording the statement, PW1 had introduced herself to the accused as Magistrate Fikile Nhlabatsi and that she had also introduced her as an interpreter and that PW1 had cautioned the accused before the recording of the statement started in SiSwati. In answer to questions put to PW2 under cross-examination, she maintained that on that day PW1 had first introduced herself to the accused as a Judicial Officer before introducing her as an interpreter.
- [8] D/Sgt. 3444 Patrick Mhlanga, who is a scenes of crime officer, testified as PW3. He said he was on duty at Mbabane police station on 5<sup>th</sup> February 2009 when he received a call from D/Sgt. 3249 Tfwala asking him to proceed to Lobamba with D/Sgt. Dlamini. He said that on arrival a certain Msibi led them to a mountain and showed them the grave that had been violated. He told the Court that they examined the remains from the said grave and they found that the skull, the right arm and the left leg were missing. PW3 said he took photos depicting the mountain and the grave which had been violated as well as the bones found in the said grave. The said

photos were produced and admitted in evidence as Exhibits C, D, E, F and G.

- [9] The salient features of the Crown's evidence are to be found in the testimony of PW4 Thulani Cyprian Msibi. He testified to the effect that the accused person is his brother and that he could recall the events pertaining to the crime which took place in 2007. He said he was renting a flat at Nkoyoyo at the time and he had no money to pay his rent and so he went to see the accused at Elangeni to sell his generator to him. He said he found the accused with one Nathi who told him that a traditional healer wanted human body parts to heal his knee problem. PW4 said he was offered E15 000 (Fifteen Thousand Emalangi) and that he agreed to do the job.
- [10] PW4 said that on the day in question he left for the mountains in the company of the accused and Nathi but, since the latter was not able to walk, he and the accused left him behind and both of them continued on their way up the mountains. He said that when they reached the Mdzimba Mountain he opened the grave of the unknown deceased person by moving the stone away from the entrance to the grave. He said he then removed the bones from the skull, the right arm and the left leg which were the body parts that were needed by the traditional healer Ngcamphalala. He said the accused who had accompanied him was about 5 meters away from the grave at the time. Testifying further, PW4 said that they put the body parts in a plastic bag and covered the parts with leaves inside the plastic bag. He said he gave the bag to the accused person who

carried it back to the place where they had left Nathi. He said that they found him there and the parts were handed over to Nathi who put them in the boot of his Toyota Corolla. He said he was dropped off by Nathi who then proceeded with the accused to the traditional healer's place.

[11] PW4 went on to state that he was not given the E15 000 he had been promised and that the accused had informed him that the traditional healer did not have the money at the time. He said that it was in early February 2009 that he went to one Madelezi Tsabedze who is the Indvuna of Elangeni area to report the matter to him because his conscience was pricking him because of what he had done. He said Indvuna Tsabedze took him to Indvuna Dibanisa of Ensuka Royal Residence. He said the two Indvunas then took him to the Lobamba police station where he made a statement. He told the Court that he was later charged and convicted by the High Court on the 3<sup>rd</sup> day of February 2011.

[12] Under cross-examination, PW4 maintained that it was Nathi who was left behind and that he had been accompanied to the Mdzimba mountain by the accused and that the latter stood about 5 meters away because he was afraid. He also denied defence counsel's suggestion that he had searched alone on a previous occasion and found nothing and that it was on the second day that his brother and Nathi had accompanied him. PW4 maintained that he had never searched alone and that he and the accused had searched only for

one day and that they had found what they were looking for at around 3:30 p.m. He denied that the arrangement for the bones was between he and Nathi and he said the arrangement was between himself, Nathi and the accused. PW4 also denied the allegation that he had approached the headman because the accused had not paid him for the generator he had sold to him. He said his brother had borrowed money from someone at the casino and that he had paid him E350 for the generator.

[13] PW5 was Dibanisa Philip Mavuso. He testified that he was an Indvuna of Ensuka Royal Residence and that his duties pertain to Royal duties and other duties in connection with that. He said that he also carries out duties pertaining to funerals of members of the Royal family who are usually buried at the Mdzimba mountain and other mountains. He said the procedure they followed when they buried was that they looked for caves and they put the body inside the caves which they then closed with stones. He said they do not put soil inside the caves. PW5 went on to testify that on 3<sup>rd</sup> February 2009 he had received a report from Joseph Madelezi Tsabedze, the Indvuna of Elangeni, that a grave at the Mdzimba mountain had been dug out and human body parts removed. He said that when PW4 was brought before him PW4 told him that he had entered into an agreement with the accused and that he should find bones for them and they would pay him E15 000. PW5 said that he then went to Ludzidzini Royal residence to report the matter at his headquarters and that he called the Police Commander Isaac

Magagula to give him a helping hand. He said he reported the matter to the Lobamba police and it was decided that they should go to the mountain with PW4. He said they found the place from which he had taken the bones and that upon inspection of the remains he found that the left thigh, the right arm and the skull were missing. He said photos were taken and after that they put the bones back into the coffin and then they left. PW5 was not cross-examined.

[14] PW6 was D/Sgt.Tfwala who was the investigating officer in this case. He testified that their investigation led to the arrest of the accused at Elangeni. He said that when they had found the accused they had introduced themselves as police officers from Lobamba police station and that he had further cautioned the accused who opted to tell them something. PW6 said the accused then led them to one Ngcampalala, a traditional healer, at KaNdzangu in the Lobamba region. He said he introduced himself to him and told him that they were following a lead that he had been given some bones by the accused. He said the traditional healer took them to his consulting room and he gave them a plastic bag which contained pieces of bones which looked like a skull. PW6 said that they took those bones with them and that they made arrangements to take the bones to Pretoria to clarify whether they were human bones. He said they later received a report from Pretoria stating that the bones were human bones. By consent the report dated 2010/08/18 was admitted as Exhibit H. Furthermore, PW6 told the Court that he had



cautioned the accused in terms of the Judges' Rules before he was formally charged for the present offence.

[15] I shall now turn to consider the defence put forward by the accused person who, as indicated earlier, elected to give evidence on oath. He testified that PW4 is his brother but that they do not share the same mother. He said after performing a traditional wedding ceremony in 2007 his friend Nathi had asked him to accompany him to drop his brother's wife at Mpolonjeni. He said Nathi had asked him to drive and he had agreed because he knew that Nathi was not well. He said they took Nathi's brother's wife to her parental home and on their return Nathi said he wanted to pass by a certain homestead to see one Ngcampalala who was one of the traditional healers he had once worked with. He said that on arrival there were a lot of people; that they waited and later Nathi went inside while he was seated in the car with another boy; that Nathi took about 5 minutes and after he came out he called him to come in and he introduced him as a traditional healer also; that the traditional healer asked him what he was able to heal and he explained to him. The accused said that the traditional healer continued to have a conversation with Nathi who told him he wanted to be healed of his knee problem. He said Ngcampalala then asked Nathi to help him with "sotsamlilo". The accused said that they got confused as to what that was. He said the traditional healer then explained that he wanted human bones, the skull, arms and legs because there was something that he wanted to make. He said Nathi asked where he

could find these bones and the traditional healer told him to ask the traditional healers in their area.

[16] The accused said that he and Nathi left confused as to where to get the bones. He said on their way he remembered that his brother Thulani had once mentioned that there were bones in the mountain. He said Nathi persuaded him to talk to his brother and that fortunately Thulani had come to collect the money he owed him for his generator he had sold to him. The accused said that Nathi told Thulani that he wanted a certain thing and that Thulani asked him to accompany him up to the mountain. He said that he was very far by the road when they went up. He said that Thulani looked but could not find it so he said as it was getting late he would come back to look for it. He said Thulani came back around 3p.m. and he was in a hurry because he wanted the money from Nathi.

[17] The accused also testified that he was standing at a distance and that Thulani used a stick to take those things from the cave because the coffin was rotten. He said that he was not used to dead bodies and that he was afraid of them. He said Thulani took the things and put them in a plastic bag and that he covered the thing with a leaf because he did not want people to notice what he was carrying. The accused said he then informed Nathi that Thulani had got the thing and that Nathi took it and put it inside the car boot. He said they dropped Thulani at Ezulwini for him to get transport to Nkoyoyo and then he accompanied Nathi to the traditional healer. He said that on

arrival at the traditional healer's place, Nathi opened the boot and the healer took the thing to the consulting room. He said they went inside the house and Nathi told the traditional healer that the person who had retrieved the bones from the mountain wanted payment. The accused said the traditional healer gave Nathi R100 for petrol and told him he did not have money at the time. He said he went back home and Thulani asked for the money and he told him that the healer had not given it to Nathi. The accused said that sometime later he had a disagreement with his brother Thulani who then said he would do something to get him arrested because he owed him for the generator. He said that was when he was arrested.

[18] Under cross-examination, the accused admitted that he knew that what the traditional healer and Nathi were discussing was illegal but he said that did not concern him. He admitted that he had told Nathi about Thulani having seen bones in the mountains. The accused also admitted that he had not reported the incident to the police nor to the Ag. Chief or the Indvuna of the area. When asked whether he knew that it is an offence not to report a person in possession of human body parts the accused replied that he did not know.

[19] It has been submitted by defence counsel Mr. S. Jele that the accused did not participate in the act of removing or extracting parts of a human body of an unknown deceased person and neither did he dig up or participate in digging up a grave of an unknown deceased person. Counsel referred the Court to the case of **R v**

**Mgcibelo Malindzisa and Others Criminal Case No:100/1998** at page 22 in which the High Court of Swaziland cited the South African case of **R v Chenjere 1960 (1) SA 473 (FC)** and he submitted that the fact that the accused knew of the act does not make him guilty of participating in the commission of the offence. Defence counsel further submitted that the accused did not even participate in the commission of the offence but was merely a bystander and that the issue of *mens rea* does not even feature when looking at the circumstances of the case.

[20] In my opinion, these submissions are clearly unacceptable. In the first place, there is no reason in principle why the accused, as a participant in a common purpose, cannot be held as responsible as the other participant simply because he remains an accessory before the fact and does not actively participate in the execution of the enterprise to which he has agreed or encouraged. Moreover, it is my considered view that the case of **R v Chenjere (supra)**, which Mr. Jele has cited, is distinguishable from this present case. In that case, the Court was confronted with the situation where the accession to the common purpose had taken place after the victim had been fatally wounded, and the person who had acceded to it did not accelerate the victim's death. Judging from the facts of this present case, however, I find that the accused had already associated himself with the common purpose even before he had gone up to the Mdzimba mountain with PW4.

[21] Moreover, in accordance with the general principle of the criminal law, it is trite that a person who intentionally assists in the commission of a crime or encourages its commission may be convicted as a party to it. In the Australian case of **McAuliffe v The Queen (1995) 183 CLR 108** the High Court said as follows:

*'The doctrine of common purpose applies where a venture is undertaken by more than one person acting in concert in pursuit of a common criminal design. Such a venture may be described as a joint criminal enterprise. Those terms - common purpose, common design, concert, joint criminal enterprise - are used more or less interchangeably to invoke the doctrine which provides a means, often an additional means, of establishing the complicity of a secondary party in the commission of a crime. The liability which attaches to the traditional classifications of accessory before the fact and principal in the second degree may be enough to establish the guilt of a secondary party; in the case of an accessory before the fact where that party counsels or procures the commission of the crime and in the case of a principal in the second degree where that party, being present at the scene, aids or abets its commission. But the complicity of a secondary party may also be established by reason of a common purpose shared with the principal offender or with that offender and others. Such common purpose arises*

*where a person reaches an understanding or arrangement amounting to an agreement between that person and another or others that they will commit a crime. The understanding or arrangement need not be express and may be inferred from all the circumstances. If one or other of the parties to the understanding or arrangement does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, they are all equally guilty of the crime regardless of the part played by each in its commission.”*

[22] To my mind, for the accused in this instant case to maintain that he had not participated in the crime of contravening Section 80 *bis* (1) (c ) of the Crimes Act 6 of 1889 (as amended) and that he was a mere bystander sounds too farfetched and implausible. I find that there is overwhelming evidence that the accused had been involved in the criminal enterprise to the extent of not only being an accessory before the fact but by being an accessory after the fact as well. The evidence adduced by the Crown clearly demonstrates that the accused had told Nathi about PW4 having seen bones in the mountain, that the accused had accompanied the said PW4 to the mountain to remove the said bones, that he had called Nathi to come and collect the bones from them after their descent from the Mdzimba mountain and that he had also accompanied Nathi to

deliver the bones to Ngcamphalala the traditional healer in KaNdzangu.

[23] I accordingly find that the Crown has proved its case beyond reasonable doubt. In the circumstances, I reject the defence put forward by the accused and I hereby convict him as charged in the Indictment dated the 5<sup>th</sup> day of July 2010.

**For the Crown**  
**P. Dlamini**

**Mr.**

**For the Accused**  
**S. Jele**

**Mr.**

**DELIVERED IN OPEN COURT IN MBABANE ON THIS THE.....  
DAY OF MARCH 2012.**

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**M. M. SEY (MRS)**  
**JUDGE OF THE HIGH COURT**

