

IN THE COURT OF APPEAL OF SWAZILAND

HOLDEN AT MBABANE APP. NO.21/85

In the matter between:

ELIJAH BHEKITHEMBA ZUNGU Appellant

v

THE QUEEN

CORAM: MAISELS, J.P.

AARON, J.A.

HANNAH, C.J.

COUNSEL FOR APPELLANT: MR. F.P. NDZIMANDZE

COUNSEL FOR RESPONDENT: MR. S.N. DLAMINI

JUDGMENT

(11/03/86)

Meisels, J.P.

The appellant was convicted in the High Court of the murder of one Abednego Shongwe. No extenuating circumstances having been found he was sentenced to death.

The case for the Crown, briefly stated, is the following. On the 31st January 1985 at about 8p.m. the deceased was found by a Miss Thring crying for help. At the same time she noticed a flicker of lights from a vehicle which were going on and off and finally off. Miss Thring, after hearing the cries for help ran to report to her parents and she was driven in her grandfather's car to where she had seen the lights. Upon arrival there it was found that the vehicle had already left. There was a chase of this vehicle but the chase came to an end because there was not enough petrol. Miss Thring returned to the place where she had heard the cries and found that the deceased had apparently staggered some

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distance and collapsed at a spot near a homestead. There is no doubt that when the deceased was found there were two stab wounds which were observed by Miss Thring. The deceased was still alive when he was found and was taken to hospital by the witness Mr. Harris. By the time Miss Thring and members of her family had wrapped the deceased in a blanket and, according to Mr. Harris, the blanket was covered in blood. It is clear from the evidence of Mr. Harris that the deceased suffered no further injuries when he was transported to the hospital where surgery was performed on him. Unfortunately the doctor who performed the surgery had left Swaziland by the time of the trial of the appellant. The deceased died on the 26th February 1985. It is not, and cannot be, contended that the cause of the deceased's death was not the infliction of stab wounds in the upper and lower abdomen in the midline area.

The deceased had been employed as a driver of a taxi by its owner Mr. Magagula. He, on 1st February, received a report in connection with the deceased and his taxi. He found the deceased in hospital and his taxi missing. A few days later, namely on the 4th February, 1985, Mr. Magagula found his taxi outside a Bar. He ran to a police officer, made a report to him and the two of them went to a car. The police officer in question was Driver Constable Khuzwayo. When Mr. Magagula first saw his taxi it was empty but when he and Khuzwayo were on their way to it they found the appellant accompanied by another person going towards it. The appellant got into the driver's seat and was about to start the car. His companion had not yet entered it. Constable Khuzwayo got hold of the keys of the car from the appellant, arrested him and drove him in it to the police station. At the police station the appellant was searched and there was found in his possession a wallet. This wallet contained a number of papers in the name of the deceased

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Abednego Shongwe and not the appellant. Asked by the police how he had come to be in possession of the wallet, he said he had found it together with the documents in it in the cubbyhole of the car. The police asked the appellant for his name. He refused to give it with the result that a charge was originally brought against him in the name of the deceased. After the appellant was taken in custody, Mr. Magagula was allowed to take his car away. I should perhaps here mention that according to Mr. Magagula's evidence, although the car still bore its proper licence numbers, the taxi sign that had been on top of it had been removed. When Mr. Magagula arrived home after having taken his car away, he wanted to clean it and consequently he opened the doors and the boot of the car. In the boot he found a bag, a pair of trousers, certain handkerchiefs and books. In the course of cleaning the vehicle he noticed something bulging under the mat, he lifted the mat and saw that the cause of the bulge was a short spear about half a metre long. He immediately took these items to the police station at Manzini to where the appellant had been taken. The appellant was confronted with these articles. He said, according to the evidence, that the bag did not belong to him but the rest of the items were his. I should also mention that in the presence of Magagula the appellant stated that he had hired the deceased to take him to Ngwane Park. It was near this Park that the deceased was found bleeding from what were stab wounds. The trousers which were found in the car appeared to have certain spots on them which were red - they appeared to be blood stains. The appellant told the police that these were his trousers. He explained to them however that they were not blood stains but were spots which had come on to the trousers because he had sat on some tar. These spots however were not only on the seat of the trousers but were also down the front of the right leg of these trousers. At the trial the appellant denied that he had told

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the police that they were his trousers and in fact denied that they were his.

In the evidence given by the appellant at the trial he admitted that most of the stains on the trousers were blood stains. He was unable at the trial to see any tar stains on the trousers. At the trial appellant stated that he had been asked about these trousers even before they had been handed in by Magagula. This of course was patently untrue.

The appellant's evidence differed considerably from that of Magagula and of the police witnesses. His evidence was that he happened to meet a man called Siphon Mabuza in the bar to which he had gone for a drink. In the course of conversation with this Mabuza, Mabuza told him that he was a taxi driver and he, Mabuza, pointed to the taxi outside the bar, which is of course the taxi in question in this case. He said that whilst he and Mabuza were having a drink in the bar, the wallet in question had fallen out of Mabuza's pocket. The appellant said he had picked it up and when he was about to hand it over to Mabuza, Mabuza asked him to hold it for some time and he, the

appellant, put it in his pocket. He professed complete ignorance of the contents of this wallet until the police opened it and took out the documents, when he saw that these documents were in the name of Shongwe and not in the name of Mabuza. This story by the appellant is of course plainly false. It is impossible to reconcile this evidence with his attitude in refusing to give his own name to the police. It was only when the appellant's uncle came to the police station the day after the appellant's arrest that his true name was revealed.

The appellant's attorney submitted," the record is riddled with inadmissible admissions and/or confessions." He gave certain references to the record in support of his submission. I have

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considered every one of these references singly and as a whole. There is in my judgment no substance whatever in his submissions. Indeed so far from some of them being admissions or confessions they were exculpatory.

It is not necessary to go into details of the appellant's evidence save to say that the learned trial judge found he was a completely unsatisfactory witness. His evidence was wholly improbable and unacceptable. The learned Chief Justice found that wherever his evidence conflicted with that of the Crown witnesses he accepted the evidence of the Crown witnesses. He had no doubt, nor do I on reading the evidence, that the Crown witnesses told the truth and that the appellant was untruthful.

The following facts emerge clearly from the evidence.

1. The deceased died as a result of two stab wounds which were inflicted on him on 31st January 1985,
2. There was a car in the vicinity where the deceased was found still alive but crying for help.
3. This car disappeared when another car approached.
4. The deceased was employed by Mr. Magagula as a taxi driver.
5. The car he was employed to drive was found four days later outside a bar.
6. The appellant stated that the deceased had hired him to take him somewhere.
7. When the car was found the appellant was in the act of starting the car with the keys belonging to the car.
8. The appellant when searched at the police station had in his possession a wallet which he then said he had

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found in the cubbyhole of the car.

9. This wallet had a number of papers in it in the name of the deceased.
10. The appellant gave a demonstrably false explanation bordering on the ludicrous to explain how he came to be in possession of this wallet.

11. He refused to give his name to the police when arrested, so much so, that the police originally charged him under the name of the deceased.

12. The appellant admitted to the police that the trousers found in the car by Mr. Magagula were his trousers. They had blood stains on them.

13. The appellant gave a false explanation as to how he came to be in possession of the keys and was about to drive off in the taxi when he was apprehended.

On these facts the "perfectly sound, rational, commonsense solution" to be found in the present case is that the appellant was responsible for inflicting the wounds as a result of which the deceased died, of. R v Mlambo 1957 (4) SA 727 (A) 737 D - F and it is quite unrealistic under these circumstances to have regard to the realms of conjecture. of. e.g. R v Ndhlovu 1945 AD 369 at 386; R v Dhlymayo 1948 (2) SA 671 (A) at 678; S v Sauls 1981 (3) SA 172 (A) at 182 H-183 B.

There is in the present case the features that the appellant has, in my opinion, rightly been found to have given untruthful evidence. This is a factor which the trial judge and which this Court is entitled to take into account in strengthening the inference of guilt of the appellant from the facts set out above.

In Broadhurst v Rex 1964 AC 441 at 457 Lord Devlin stated:

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"It is very important that the jury should be carefully directed on the effect of a conclusion, if they reach it, that the accused is lying. There is a natural tendency for a jury to think that if an accused is lying, it must be because he is guilty and accordingly to convict him without more ado. It is the duty of the judge to make it clear to them that this is not so. Save in one respect, a case in which an accused gives untruthful evidence is no different from one in which he gives no evidence at all. In either case the burden remains on the prosecution to prove the guilt of the accused. But if on the proved facts two inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt. What strength it adds depends of course on all the circumstances and especially on whether there are reasons other than guilt that might account for untruthfulness".

In the present case I have been unable to find any reason other than guilt which might account for the appellant's untruthfulness. The appellant was given an opportunity of giving evidence or placing facts before the Court on the question as to whether there were any extenuating circumstances.

His Counsel advised the Court that the appellant persisted in his defence that he had not been guilty of the assault on the deceased which led to the latter's death. The only circumstances that were or could be urged in the appellant's favour was that he

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was 24 years of age. Although the youth of an accused person is something that the Court must consider in all cases - of S v Letsolo 1970 (3) SA 476 (A) at 477 A - B, there is no doubt that the learned trial judge considered this matter and came to the conclusion that in the circumstances of the present case the comparative youth of the appellant was not an extenuating circumstance.

There are, in my opinion, no legally permissible grounds upon which this Court would be justified in interfering with the discretion exercised by the learned trial judge in passing an appropriate sentence.

In my opinion this appeal fails and should be dismissed.

(Sgd. ) I.A. MAISELS

JUDGE PRESIDENT

(Sgd.) S. AARON

JUDGE OF APPEAL

(Sgd) N.R. HANNAH

CHIEF JUSTICE