IN THE APPEAL COURT OF SWAZILAND

APP. NO. 15/86

HELD AT MBABANE

In the matter of

MAGUNGWANE SHONGWE

MANIKI DLAMINI

SITSEBE SHONGWE

vs

THE KING

CORAM: MAISELS, J.P.

ISAACS, J.A.

VAN WINSEN, J.A.

JUDGMENT 10/10/86

MAISELS, J.P.

The three appellants were charged in the High Court together with two other persons with the murder on the 17th November, 1983 of a young boy said to be about ten years old, one NJANI KUNENE. They all pleaded "not guilty". The two other persons were acquitted but the appellants were duly convicted. In the case of the first and second appellants no extenuating circumstances were found and they were sentenced to death. The third appellant, extenuating circumstances having been found with some hesitation in his case by the Court a quo, was sentenced to imprisonment for fifteen years.

That the young boy was murdered and his body mutilated for ritual purposes admits of no doubt. The only question for decision by the Court apart from that of sentence raised on behalf of the second and third appellants, is whether the appellants were found beyond

reasonable doubt to have committed what was rightly described by Hannah C.J. who tried the case with the assistance of two assessors as "horrifying". It is quite unnecessary for me to deal with the extent of the mutilation carried out on an innocent, defenceless young boy by the perpetrators of this crime. It would not be inappropriate to say that the murder was the murder by beasts.

Hannah C.J. gave what in my opinion is a scrupulously fair judgment in which he dealt more than adequately with all questions of fact and law which arose in the case in a manner which I can only describe as admirable. Indeed the judgment is so comprensive that it is unnecessary for me to set out in any detail the evidence upon which the convictions were based.

The evidence against the appellants consisted firstly of that of an accomplice called Mjoniseni Mkhabela who had been convicted of taking part in the same murder with which this Court is now concerned. He was sentenced to death by the High Court but on appeal, although his conviction was confirmed, the sentence was reduced by the Court of Appeal to imprisonment for eight years. The learned Chief Justice correctly approached his evidence with considerable caution and reminded himself of the danger of acting on his evidence, however credible it might be, unless it was corroborated in a material respect in the case of each accused. That the Chief Justice did in fact deal with the evidence of this witness in this manner is apparent from a reading of the judgment. I shall rafer to this witness as an accomplice. Indeed if the Crown case rested on the evidence of this witness alone it is clear that the appellants would have been acquitted. The reason why the two other persons to whom I have referred above, were acquitted, was because there was no satisfactory evidence corroborating that of the accomplice.

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The first appellant was at the time the crime was committed the Chief of the Shongwe tribe in the Mashobeni area and a man of considerable authority in that area. The second and third appellants were members of his Inner Council as well as being inyangas or medicine men. The victim of the crime was the nephew of the accomplice. He was said to be "on loan" to the accomplice by his parents for employment as a herd boy. Without going into detail which is set out fully in the judgment of the Court a quo, the first appellant, according to the evidence of the accomplice, succeeded after initial refusals by the accomplice, in obtaining this young boy as a herd boy. The accomplice stated that the first appellant said he wanted the young boy in order to strengthen his position as Chief because his people did not respect him. I might perhaps be permitted to say that in my experience in this Court it has frequently, if not invariably, been the case that a ritual murder is committed for the purpose of strengthening either financially or in some other way the position of the person who brings about a ritual murder. A brother of the accomplice gave evidence that the second appellant approached him for his co-operation in order to obtain the herd boy for the first appellant. The accomplice gave a detailed account which, of course, was to be expected as to how the murder was committed and as is almost invariably the case, minimising the part he played. He described how he found the victim in the company of two other young boys, Mahhabenyoni Mhlanga and Mapuludi Mhlanga. He stated that he had sent these two boys who were in the company of the victim, to fetch some donkeys and took the victim to the first appellant, with the co-accused and one other man beneath a tree near a broken fence. The two young boys to whom I have referred are brothers and their ages were estimated by the Court a quo as being sixteen years and eight to ten years respectively. There is no doubt that there were certain discrepancies in their evidence but there is equally no doubt that the learned Chief Justice approached their

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evidence with the caution requisite in the case of the evidence of young children, particularly of the younger boy. To summarise, their evidence was to the effect that they were in the company of the victim when he went away from them and that they saw the three appellants together clearly at a time near to sunset on the day when the two boys parted company with the victim. The three appellants were in a place near to where the victim wa taken. That the three appellants were well known to the two young boys to whom I have referred is clear. There cannot be a question of a mistake as to the identity of the three appellants whom they said they saw. The first appellant was their Chief, the second their close neighbour and the third a man who frequented their parental homestead for beer drinks. The learned judge a quo was satisfied that the two boys were credible and reliable witnesses and that they did indeed see the three appellants in the area to which the victim was taken. I should perhaps have mentioned that according to the evidence the body of the victim was discovered some days after the mutilation had taken place, floating in the Komati River in the North of the country. The learned Chief Justice correctly considered the

evidence of the two yaung boys as corroborative of that of the accomplice, as indeed it was.

What was the defence of the appellants? In the case of all three it was in effect what is known as an "alibi". The first appellant stated that he had left Swaziland on the day in question, namely the 17th November, 1983, to visit a place called Tongah in the Republic of South Africa in order to attend a meeting of his people at the Magistrate's Court. There is no doubt that his passport shows, and this was accepted by the Crown, that he did in fact cross the Matsamo Border Post on that day and returned through the same Border Post on the next day. He said he did not return to Swaziland on the afternoon of the 17th November

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but that he, together with other persons, stayed at the home of his uncle, Joseph Shongwe not far from the Border Post. His reason for spending the night there was that the Border Post closes at 4p.m. and would have closed by the time of his arrival there. After coming to Joseph's home he had been to drink and by this time it was dark. He said he had drinks at various huts in the compound and eventually to bed in the same hut as his brother, Sidumo, with whom he had been travelling that day. When I say that Sidumo is his brother I should have added that he is actually his cousin but apparently according to Swazi custom would be known as his brother. He stated further that he and Sidumo woke up the next morning, they washed and had tea and Sidumo took him to the Border Post, and he crosed into Swaziland. He said he only learned the deceased was missing the following week. He denied most strenuously that he had anything to do with the killing of the deceased. He further denied that he had ever asked for the deceased. The burden of proof, of course, lay on the Crown to negative this alibi and it did so in the following way. The Investigating officer, Inspector Vilakati, prepared a plan of the area which showed the spot where according to the accomplice the killing and mutilation took place, the mango tree near where the victim and the two young boys were when the accomplice says he found them, the homestead of the second appellant, that of the first appellant, that of Joseph, the Border Post and a path which the Inspector stated went from near the first appellant's homestead to the border fence, and from there to the home of Joseph Shongwe. It was quite apparent to the Court a quo from the plan and the Inspector's oral description of the distance involved that anyone at Shongwe's place could, if he had wished to, cross the border fence illegally and have been at the point where the young boys were when the victim left the two of them within an hour or so. Put more specifically, the Court found that the first appellant could have left Joseph's home at any time

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between 4p.m. and 5p.m. and been at that place at about sunset. I should have stated that the evidence of the two young boys was to the effect that it was late in the afternoon when they were separated from the victim. Needless to say, the first appellant denied that this is what happened. He said that he had spent the evening and night at Joseph's place, first drinking with Sidumo and others, and finally retiring to bed in the same hut as Sidumo. However, according to the evidence of Sidumo, who was called as a witness by the Crown, this was not the position. Whilst he agreed that the first appellant had indeed come to Tongah and had been at Joseph's place, he stated that shortly after their arrival the first appellant went off, saying that he was going to look for liquor. He thought that the time that the first appellant left him was about 4.45p.m. Sidumo is employed by the Government of Swaziland in the Department of Land Development of the Ministry of Agriculture. Apparently he usually knocks off work at 4.45p.m. and the appellant had left him prior to that time. He says the next time he saw the first appellant was some time before 8a.m. the next morning when he drove him to the Border Post. He did not knew where the first appellant had spent that night. The inference to be drawn from his evidence, which was accepted by the Court a quo,and there is no reason why it should not have been so accepted, indicates quite clearly that the first appellant was untruthful when he said that he had spent the night in Sidumo's hut. It follows from this and the evidence given by the Inspector that there was no difficulty in the first appellant leaving Tongah, going into Swaziland over or across the border

fence and committing the crime with which he has been charged. It is quite correct to say that one cannot infer guilt merely because an accused person has been found to have lied in his evidence. I would respectfully approach this question in the mariner in which it was dealt with in the Privy Council by Lord Devlin in BROADHURST v REGINA (1964) 1 All E.R. 111 at 1 to 120 B Lord Devlin said:

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"It is very important that a 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 fo the judge to make it clear to them that this is not so. Save in one respect, as 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 untruth-fulness 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."

I am unable in the present case to find reasons other than guilt that might account for the untruthfulness of the first appellant. In my opinion the Court a quo was entitled on the evidence to find that the alibi was false and that the first appellant was involved in the murder of the deceased.

As far as the second appellant is concerned, he says he spent the whole of the 17th November at home. He gave the names of persons who spent the day with him. He was not obliged to call any of these persons as his witnesses to support his evidence, but the fact remains

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that he did not do so. As the learned Chief Justice accepted that he was together with the first appellant when the murder was committed there seems to be no doubt as to his guilt as well.

The third appellant denied any knowledge of the killing. He said he spent the whole of the 17th November at his homestead building a kraal for this goats. He stated he did not know the two young boys who gave evidence in the trial. This, quite apart from the fact that this evidence conflicts with that of the two young boys with regard to their having seen him on the 17th November, but also on another point they stated that they knew him because he came to drink at their parents' home. He said that he had never been to that home and did not even know where it was. In fact he maintains that he never drinks at anybody's home except his own. The trial Court, not surprisingly, did not believe him, and on acceptance of the evidence of the accomplice where it was corroborated by that of the two boys, correctly, in my opinion, convicted him as well.

The fact that I have not dealt specifically with the strenuous arguments advanced by Counsel for the appellants on their behalf in this Court does not mean that I have not considered them. However, all these arguments seem to have been advanced in the Court a quo and they were rejected on sound grounds in that Court. I am unable to find any reason for disagreeing with the conclusions of the trial Court as to the guilt fo the appellants. It remains to deal with the question of sentence.

Nothing could be urged in extenuation of the conduct of the first appellant if he was found guilty of murder having regard to his position as Chief. Instead of setting an example to his people, he has behaved, as described by the learned Chief Justice, as a "primitive savage".