IN THE COURT OF APPEAL OF SWAZILAND

APP. CASE NO.33/86

In the matter of:

LOMASONTFO MAMBA

MBANGO MAMBA

NELLIE N. SHABANGU Appellants

vs

THE KING Respondent

CORAM: MAISELS, J.P.

COHEN, A. J. A.

HANNAH, C.J.

FOR THE APPELLANTS: MR. F. NDZIMANDZE

FOR THE RESPONDENT: MR. M. NSIBANDZE

JUDGMENT

(15/05/87)

Hannah, C.J.

The three appellants were tried by Dunn A.J. sitting with assessors on an indictment which alleged that on or about 7th April, 1986 they murdered Zenzele Ngcwane (the deceased). Each was convicted of murder and, no extenuating circumstances having been found, they were sentenced to death. They now appeal against conviction.

It was not in dispute at the trial that on a Monday in April 1986 the deceased, a twelve year old herdboy, failed to return from herding cattle and that on Wednesday of the same week his body was recovered from a dam in a mutilated condition. Various organs had been removed and it is obvious from the injuries that the deceased had been killed for so-called ritual purposes.

The case for the Crown depended on the evidence of three herdboys who had been with the deceased on the afternoon of his disappearance and in the case of the first appellant on a confession allegedly made by her to a magistrate on 15th May 1986. The three herdboys all gave evidence on similar lines to the effect that they had spent the Monday in question with the deceased herding their cattle and bathing in a dam. Late in the afternoon they were on their way home when they came across the three appellants. I should mention here that the three appellants are closely related, the third appellant being the second appellant's wife and the first appellant his daughter. Also two of the herdboys were the grandchildren of the second and third

appellants. The first appellant then called the deceased over and told the other herdboys to go on home. Shortly after, however, she ran after them and told them not to mention that the deceased had remained with them but to say instead that he had remained at the dam. The three herdboys returned to the homestead which they shared with the appellants and later in the evening the appellants returned without the deceased. By then one of the herdboys had left for his own home but according to the other two they were called to the second appellant's hut where the first and second appellant repeated the earlier warning as to what they should say about the deceased.

When the deceased failed to return home and enquiries as to his whereabouts were made the herdboys gave the explanation which the first and second appellants had said they should give and when the police were called in on the following day they continued to say that the deceased had been left at the dam. However, when the body of the deceased was recovered on the Wednesday each of the herdboys told the police of the appellants' involvement.

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The herdboys were cross-examined at some length but remained unshaken in their account of events. They had lied initially, they said, because of their fear of the appellants and what might happen to them but once the body was discovered decided to tell the truth. It also emerged that they had been kept in police custody for three months but the investigating officer explained that this step was taken for their own safety and they were not detained in cells. Another piece of evidence given in cross-examination and which the appellants' attorney seeks to rely on is that in answer to the question "You have memorised your story over three months in police custody" PW1 replied "Yes".

Mr. Ndzimandze's submissions to this Court have been mainly directed to the finding by the learned trial judge that the herdboys were honest and reliable witnesses whose evidence could be accepted as truthful and accurate. It is submitted that he failed to place sufficient weight on their youthfulness when assessing their evidence, that he should have approached their evidence with great caution in view of their lengthy detention and the fact that initially they had lied and that he should have attached more weight and significance to the admission by PW1 that he had memorised his evidence over a period of three months. Taking these matters into account it is submitted that the learned judge should have entertained doubts as to the veracity of these witnesses and should have found that the appellants' evidence that none of them had met up with the deceased that Monday afternoon might reasonably have been true. As this Court is being invited to disagree with the learned judge's findings on credibility it is as well to set out the proper approach which this court should adopt. In Khov Sit Hoh v Lim Thean Tong 1912 AC 323 the Privy Counsel said:

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"In coming to a conclusion on such an issue, their Lordships must of necessity be greatly influenced by the opinion of the learned trial judge, whose judgment is itself under review. He sees the demeanour of the witnesses, and can estimate their intelligence, position and character, in a way not open to the courts, who deal with the later stages of the case .... Of course it may be that in deciding between witnesses, he has clearly failed on some point to take account of particular circumstances or probabilities, material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable facts; but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesitate long before it disturbs the findings of a trial judge based on verbal testimony".

Having considered the submissions made I am unable to find anything of sufficient substance in them to lead me to disturb the learned judge's findings of credibility. The learned judge was

perfectly capable of assessing whether the witnesses were prone to imaginativeness or receptive to suggestion by reason of their youth and in this regard it has to be observed that one of the herdboys was sixteen years of age; while the ages of the others do not appear to have been disclosed it by no means follows from their description as "boys" that they were persons of tender age. As for the fact that they were kept in the custody of the

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police, the evidence was that the account given by them in court was forthcoming after only one day at the police station and it cannot therefore be said that they were improperly influenced. I can also find no merit in the point made regarding PWl's so-called admission that he memorised his evidence. I do not understand the witness to have agreed to any more than that he had had three months to go over in his mind the events of that Monday.

The admissibility of the confession of the first appellant has not been challenged in this appeal and as the confession contains a clear admission by the first appellant of her involvement in the murder of the deceased that, taken together with the evidence of the herdboys, established the guilt of the first appellant beyond any doubt whatsoever. Although not wishing to abandon the first appellant's appeal Mr. Ndzimandze was obliged to concede this to be the position.

I therefore proceed to consider the case against the other two appellants which depended entirely on the inference to be drawn from a number of circumstances, i.e. circumstantial evidence. In R v Blom 1939 AD 188 Watermeyer C.J. said at page 202:

"In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences,

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then there must be a doubt whether the inference sought to be drawn is correct".

The proved unchallengable facts in this case were as follows:

(a) The three appellants, all closely related, were together on the afternoon of the Monday with which we are concerned;

(b) As the deceased and other herd boys passed them the first appellant called the deceased over and the deceased thereafter stayed with them;

(c) The first appellant warned the remaining herdboys not to reveal that the deceased had remained with them but to say instead that he had been left at the dam;

(d) That later that evening the three appellants returned to their homestead without the deceased;

(e) That two of the herdboys were then called by the appellants and the earlier warning was repeated by the first and second appellants;

(f) That on the Wednesday the mutilated body of the decased was found at the dam referred to

by the first and second appellants when giving the warning;

(g) That all three appellants falsely denied having any involvement with the deceased on the Monday.

I have no doubt that when these facts are taken cumulatively an inference can be drawn that the three appellants were acting in concert and that the deceased met his death at their hands. However, it still remains to be consider whether in the case of each appellant this is the only reasonable inference to be drawn. In the case of the first and second appellants it is, in my view, quite clear from the fact that they warned the herdboys

not to disclose that the deceased had been left with them that they must have expected enquiries to be made concerning the whereabouts of the deceased. That, to my mind, is as clear an indication as can be had that they knew what fate was planned for the deceased and that they themselves were part of that plan. When to that is added the fact that within a few hours they returned to their homestead without the deceased and that his body was found within forty eight hours floating in the dam in a mutilated condition I have no hesitation in holding that the only reasonable inference is that the plan had been executed that evening and that these two appellants played a part in the murder of the deceased. Although the precise part played by the second appellant cannot be identified that he played a part I have no doubt.

The only distinction to be drawn between the evidence against the second appellant and that against his wife, the third appellant, is that in the case of the latter she did not give any warning to herdboys to give a false explanation of the whereabouts of the deceased. However, she was one of the group of three with whom the deceased was last seen and, according to the evidence of PW1, she returned with the other two appellants that evening without the deceased. As with the other two appellants she also lied about the deceased being left with the three of them.

In my view it would be totally unrealistic to regard the presence of the third appellant with her husband and daughter when the deceased was detained as coincidental. If she was not privy to what was to happen I have no doubt the other two appellants would have ensured she was elsewhere. In my judgment, she must be held to have known the purpose of the detention of the deceased and, as she returned with the two appellants a few hours later, during which time I have no doubt the deceased was murdered, I have no

difficulty in concluding that as with the two co-appellants she played some part in the crime. In my judgment, no foundation exists in the evidence for supposing that she was merely an innocent by-stander trailing around after her husband and daughter while they committed murder.

In my judgment, therefore, the only reasonable inference to be drawn in the case of each appellant was that each participated in the murder of the deceased and they were rightly convicted.

As for sentence, attorney fro the appellants has not sought to argue that extenuating circumstances should have been found nor, in the circumstances of this case, do I see how he could. Accordingly, no reason exists to disturb the findings of the learned judge either on the question of conviction or sentence.

I would therefore dismiss these appeals.

N.R. HANNAH CHIEF JUSTICE

I agree.

I.A. MAISELS

JUDGE PRESIDENT

DISSENTING JUDGMENT

Cohen A. J. A.

I agree that the Crown has proved beyond a reasonable doubt that numbers 1 and 2 were a party to the murder of the deceased Zenzele Ngcwane, although there is no clear evidence to show the role which No.2 played in the murder. I am however in doubt whether the Crown has succeeded in proving beyond a reasonable doubt that No.3 appellant was a party to such murder.

The only evidence against No.3 appellant is that of the herdbdys whose testimony that the deceased was detained by No.l at the dam is accepted by me. I do not, however, agree with the submission of the learned Crown prosecutor that it was established that the deceased was detained in her custody. I assume that she accompanied No.1 and No.2 appellants or that she may even have been present when the murder was committed.

The only further evidence against her is that she probably returned together with appellants No.1 and 2 to No.2's hut and that she may have over heard No.1 and No.2's warning to the two herdboys that they should say that the deceased was drowned. There is no evidence known that she made a similar admonition. At the most it can be said that she was a silent listener or observer and did not protest. That, however, is in my view insuffient to find established that she was a party to the warning. It is agreed that it is unlikely that a Swazi wife (and she is the wife of accused No.2) would contradict her husband. On the contrary she is more likely to stand by him and protect him.

The only other criticism against her conduct is that she falsely denied her presence at the dam when the deceased was detained, but it does not necessarily flow from this falsehood that she was a participant in the killing. She may well have been present and that I think is the maximum which the Crown may have proved.

I do not think that the only reasonable inference which can be drawn on this evidence is that she must have participated in the murder. In my view, therefore, the Crown has failed to prove her guilt beyond a reasonable doubt.

D. COHEN

ACTING JUDGE OF APPEAL