IN THE COURT OF APPEAL OF SWAZILAND

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HELD AT MBABANE

CR. APPEAL CASE NO. 42/93

In the matter between:

JAMLUDI MKHWANAZI 1st Appellant

MBONGENI MASUKU 2nd Appellant

and

THE KING Respondent

CORAM:

Kotze' P.

Steyn J.A.

Tebbutt J.A.

FOR THE CROWN : Mr. L.Ngarua

FOR THE APPELLANTS : Mr. L.M. Maziya

Judgment (12/4/96)

TEBBUTT J.A.

The two appellants were convicted by Thwala J. in the High Court of murdering one Donkana Shiba near Lawuba on 3 April 1994 and of robbing him of his motorcar. In second appellant's case (I shall for convenience refer to him as MASUKU) extenuating circumstances were found to exist and he was sentenced to ten years imprisonment on the murder charge and five years for the robbery. In the case of first

appellant (to whom I shall refer as MKHWANAZI), no extenuating circumstances were found and he was sentenced to death. Both appellants now come on appeal to this Court against their convictions and sentences.

It is undisputed that on the night of 3 April 1994, Donkana Shiba, the deceased, was killed by a single gunshot wound in the back of the neck. The car he had been driving was found abandoned later. The interior was bloodstained. In the car the police found a .38 calibre fired bullet which was later identified by a police ballistics expert as having been fired from a .38 revolver of which the police obtained possession.

How the police obtained possession of the revolver was one of the pertinent pieces of evidence relied upon by the learned trial Judge in convicting MKHWANAZI. Indeed it was on this and the evidence of one Lindiwe. Ngwenya that the Court a quo based its finding of guilt against both appellants.

Ngwenya's evidence was that at about 6 p.m. on the night of 3 April 1994 she was walking from her home at Lawuba to Mbulungwane when she met Masuku. He asked her where she was going and when she told him he said that there was a motor vehicle coming and that he would ask for a lift for her in the vehicle. She told him she did not like getting lifts at night but he held her by the arm and shortly afterwards a car arrived which Masuku stopped. He asked the driver to take her to Mbulungwane but the driver said he was not going there but to Mbelebeleni. Masuku then asked him to drop her at Mafehla from where she would walk the rest of the way. She got into the car, sitting next to the driver.

Masuku got Into the back of the car where another man was also sitting. The latter was behind the driver. The car had travelled only a short distance when the man behind the driver shot him from behind. The car came to a stop and she and Masuku both got out of it. Masuku then pulled her into the bush there, where he had intercourse

with her. He told her he was "a Masuku from Sandleni working In Pongola." She said she allowed him to have intercourse with her because she was afraid he would kill her. She later walked home accompanied by him. She did not see the second man or the car again that night.

Ngwenya said that she could not identify the second man as it was dark. She certainly could not identify him as Mkhwanazi. She presumed he was the second man as he was present with Masuku at the Hlatikulu police station when she saw the two of them together there. She could not say that it was he who shot the deceased. She identified Masuku because he looked very much like his brother, with whom she had once had an affair. In fact she thought it was the latter with whom she was having intercourse that night. She said she only found out who Masuku was, when, as he accompanied her on the way home, he lit a match and showed her his tax certificate.

Under cross-examination Ngwenya said that she had not reported Masuku's rape of her, or the shooting because she "did not think of doing that."

How the police obtained possession of the revolver was described by Detective Constable Ephraem Dlamini. He arrested Mkhwanazi at his home on 8 April 1994 and warned him in terms of Judges' Rules. On 9 April 1994 Mkhwanazi took him to the home of one Thokoza Mkhwanazi where in the nearby fields a .38 revolver was found wrapped in plastic. It was the revolver sent to the ballistics expert for testing. In the latrine pit of the homestead, a boy named Sonnyboy Dlamini, whom Mkhwanazi called up on to help them, using a stick, fished out a set of keys. These were car keys which were found to fit the abandoned car of the deceased and house keys which fitted the doors of the deceased's house. They were also identified by the wife of the deceased as being those of her husband. Sonnyboy corroborated the evidence of Detective Dlamini, as to the fishing out of the keys from the latrine pit. Detective Dlamini said he also arrested Masuku and searched his room. In the pocket of a brown jacket there he found an empty .38 cartridge. The jacket, Masuku told him, belonged to Mkhwanazi. It is on record that the ballistics expert could not identify the cartridge with the .38 revolver in question.

Mkhwanazi denied any involvement in the murder of the robbery. He denied pointing out or handing over the revolver to the police or asking Sonnyboy to assist in fishing out the keys from the latrine. He said that Thokoza and Sonnyboy asked the police to implicate him in order to save one Elijah Shiba. It has to be noted that the police arrested the latter as a suspect and detained him for eight months before releasing him and that while in custody certain of the neighbouring villagers, who also suspected Shiba of the murder, burnt down his house and his motor car. Shiba was not charged with any crime. Masuku also denied any involvement in the murder or robbery. He was with Mkhwanazi earlier that evening but they parted ways, he going home and then going to Pongola to work. He denied seeing Ngwenya that night or raping her or showing her his tax certificate.

Before setting out the learned Judge's reasons for convicting the appellant it is necessary to refer to the manner in which he conducted this trial. From start to finish he intervened in and interfered with counsel, both for the Crown and for the defence in the conduct of their cases. The appellants were defended by the late Mr, Cele who died recently and who during his lifetime was a competent and experienced attorney of this Court. The trial Judge continuously interrupted Mr. Cele's cross-examination of the Crown witnesses, frequently making gratuitous and irrelevant comments during their testimony. Mr. Ngarua, who appeared for the Crown both at the trial and in this Court, also did not escape the trial Judge's displeasure, being frequently criticised for the mariner in which he was presenting his case and leading his evidence. It was, however, during Mr. Cele's argument at the conclusion of the evidence, that the Judge's conduct calls for most comment. That argument was recorded and it is quite clear that Mr. Cele was not given a proper hearing. Almost throughout his argument he was hardly able to complete a sentence without being interrupted by the Judge, despite frequent appeals by Mr. Cele to be given the opportunity to make his submissions without interference by the Court. This was particularly the case when Mr. Cele wanted to submit that the evidence of Lindiwe Ngwenya was unreliable. The interruptions by the Judge allowed him no proper chance to do so. The same applies, perhaps to even a greater extent in the case of Mkhwanazi where Mr. Cele became so distressed by the Judge's

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interruptions that he was constrained to say that he would make no submissions and was told by the Judge to sit down. There followed an acrimonious passage at arms between the Judge and Mr. Cele who, obviously so as not to disadvantage his client, continued his argument. Again he was not allowed to advance his argument properly having to endure, inter alia an accusation by the Judge that he was insulting the Judge and, when he attempted to criticise the evidence of the police, that he was also insulting the police.

It has been stressed time and again by courts in England, South Africa and Swaziland that a trial Judge should not unnecessarily intervene in the proceedings and, as it is said, descend into the arena so as to allow his judicial vision to be clouded by the dust of conflict, particularly where, as in this case, that conflict and the resulting dust has been caused by the Judge himself (see e.g. Yuill v Yuill (1945) 1 All E.R. 183 at pages 185 and 189; Jones v National Coal Board (1957) 2 All E.R. 155; R. v Roopsingh 1956 (4) SA 509 (A); Hamman v Moolman 1968 (4) SA 340(A) at 344 D - G; S. v Meyer 1972 (3) SA 480 (A) at 482 F - H and 484 D - F; Caiphas Dlamini v Rex 1982 - 86 SLR(2) 309 at 312 - 313).

In the Caiphas Dlamini case, Welsh J.A. expressed himself thus:

"In S. v Mabote en Andere 1983(1) SA 745(0), at 746, the court pointed out that it is a basic principle of criminal law that an accused person should have the right to address the court which is trying him before judgment is given on the merits and that the opportunity to exercise that right should be afforded to him regardless of his prospects of success. The court expressed the view that a failure to afford the accused that opportunity affects the essence of the administration of criminal justice and cannot be regarded as anything other or less than a gross irregularity, which destroys the fairness and therefore also the validity of the proceedings in question."

I am of the view that because of the trial Judge's conduct of the case, Masuku did not have a fair trial.

The trial Judge also misdirected himself in regard to his approach to the evidence. In his reasons for convicting the appellants he said -

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"I now have to test the evidence of the Crown and that of the defence and see which is better."

That approach is clearly erroneous. It is trite law and well-established that the trial Court in a criminal case, unlike in a civil case where the party on whom the onus lies must establish its case on a balance of probabilities, has to be satisfied that the prosecution has proved its case beyond

reasonable doubt. There is no question of considering which party i.e. the prosecution or the defence, has presented a better case. The trial Court must consider whether the accused's version or his defence is reasonably possibly true. If it Is, the accused is entitled to his acquittal.

The trial Court's reasons for convicting the appellants read as follows (Mkhwanazi was of course No. 1 accused and Masuku No. 2 in the Court a quo) -

"The Crown evidence against No. 1 is that he left Thokoza's place with No. 2 on the night of the killing. When he was arrested, he pointed the gun which was used in the killing. he also pointed the keys belonging to the deceased. It is also supported by Lindiwe that a gun was used. The deceased was shot at the back of the neck. The post morterm also supports Lindiwe's evidence. Lindiwe positively identified No. 2. No. 1 also confirms that he left Thokoza's kraal with No. 2. The bare denial by No. 1 cannot stand against the evidence led by the Crown. No. 2 has been identified by Lindiwe Ngwenya. The evidence confirms that he left Thokoza's place with No. 1. He was seen by Lindiwe at the killing. What Lindiwe told his boyfriend led to his arrest, Lindiwe's evidence is supported by his arrest, her boyfriend, the medical evidence and that he was with No. 1 on the night of the killing. No. 2 stopped the car in order to carry out their intention to kill and robbed the deceased. There was no reason for them to board the car if they did not want to rob the deceased. I find that the Crown has proved its case."

It is clear that for his conviction of Masuku, the learned Judge relied heavily on the evidence of Lindiwe Ngwenya.

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Her evidence, however, is open to considerable criticism. She at first thought that Masuku was her former lover, his brother - even when he had intercourse with her. That is, I think, extremely surprising. I also find it most unlikely that if, as she says, she saw a shooting in which Masuku was a participant and he then raped her, that he would show her his tax certificate to identify himself beyond doubt. It is also most strange that she neither reported the rape nor the shooting because "she did not think of it". She witnessed a murder but did not think to tell the police about it. Even though, as Mr. Ngarua said, she is a simple, unsophisticated rural girl, I find that hard to believe. In my view the trial Court should have placed little or no reliance on her testimony. Even on her evidence, though, Masuku could only be convicted on the basis of a common purpose. The evidence in my opinion, does not establish beyond reasonable doubt that Masuku knew that Mkhwanazi, if he was the gunman, intended to rob the deceased of his car or that he might shoot the deceased in order to do so. His association with Mkhwanazi earlier that evening falls far short of such proof. Nor does the presence in his room of Mkhwanazi's jacket, with a spent .38 cartridge in a pocket, provide such proof. The cartridge was not identified as having been fired by the .38 handed over by Mkhwanazi to the police. It is also not clear that Masuku stopped a car knowing that Mkhwanazi intended to rob the driver of it or that Mkhwanazi might shoot the driver in doing so. There is certainly no evidence to that effect, even from Lindiwe, nor is there sufficient evidence from which such an inference - and, of course, it must be the only reasonable inference (see R. v Blom 1939 A.D. (188)) - can be drawn. On Lindiwe Ngwenya's version of events, Masuku went to pains to ensure that she was with them in the car when the deceased was shot. I find it strange that if it was the intention of the appellants to rob the deceased that Masuku should wish to have Ngwenya in the car where she would obviously be an eye witness to the robbery and a possible shooting.

It is also strange that if he was a party to the armed robbery, Masuku should wish to put his identification by Ngwenya beyond doubt by showing her his tax certificate - if, of course, he ever did so.

The trial court, by not permitting defence counsel to make his submissions in regard to Lindiwe, precluded himself from properly

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evaluating Masuku's guilt. It is also certain from his judgment that he clearly did not properly consider

whether the Crown had established the existence of a common purpose between Mkhwanazi and Masuku. I am of the view, therefore, that the Crown failed to prove its case against Masuku beyond reasonable doubt and that he was entitled to his acquittal. He is accordingly found not guilty and discharged.

As far as Mkhwanazi is concerned, his conviction rested on the evidence of Detectives Dlamini, Mamba and Sonnyboy, viz that he had pointed out to Dlamini the revolver which was admittedly the murder weapon and had asked Sonnyboy to assist him in fishing out the deceased's keys from the pit latrine.

Let me say at the outset that evidence of pointing out as a means of linking an accused with a crime, should, in my view, be approached with considerable caution - especially when it is the only evidence which links an accused with the commission of a crime. Indeed, it is the lazy investigating officer's most convenient standby. It is capable of easy fabrication and difficult to refute. It is for this reason that the Courts in Southern Africa, including Courts of this jurisdiction, have insisted on proof that such pointing out was freely and voluntarily made. See R. v Petros J. Mhlongo (Court of Appeal No. 185/92 unreported, following the South African Appellate Division decision in S.v. Sheenama 199l(2)SA 869(A). In this case, however, the issue of voluntariness does not arise. There is no allegation or any evidence of assault, coercion or other conduct which could reasonably be held to have affected the voluntariness of the pointing out. The issue which is in dispute is whether such pointing out took place at all.

As already stated, the Crown led evidence that both in respect of the pistol with which the crime was committed and the keys which had been in the possession of the deceased, were in fact recovered as a result of conduct by Mkhwanazi. In so far as the keys are concerned both the police officers who testified attested to the appellant's presence and participation in the means of the discovery and recovery of this piece of evidence. They were corroborated in this respect by Sonnyboy and the wife of the deceased. It is true that in respect of

Sonnyboy's evidence there is patent confusion as to whether he was asked to find the pole - with which the keys were recovered from the pit latrine - by the appellant or by the police, but there is no doubt on his evidence of the fact that the appellant was present when the keys were recovered, that he assisted in their recovery and that both accused were present when it was demonstrated that the keys opened the house of the deceased. It is true that the deceased's wife placed the time of the latter event as being 4 April 1994 and that the appellants were only arrested on 8 April 1994. Nothing, however, in my opinion turns on this contradiction. To fail accurately to recall months after the event the date at which the police visited the home of the deceased is no ground for holding that the evidence was fabricated or of a police conspiracy to implicate the appellant.

However, the suggestion that the police fabricated the evidence of the pointing out of the revolver and the keys must be seriously considered. I say this, firstly, because of the risks inherent in this kind of evidence as outlined above. Secondly, it must be borne in mind that this was the allegation made by the defence during the trial and was in fact tendered in evidence by Mkhwanazi.

The version of a fabrication by the police has to be tested against the available evidence and the probabilities. In regard to the probabilities, it would seem to this Court to be highly improbable that the police would have set in motion a complex train of events culminating in keys being recovered from a pit latrine by the use of a pole, washed in the presence of witnesses and found to fit the car and the doors of the deceased's house. The same applies to the revolver, which was found in a different spot in the field nearby. Again, it would require extraordinary sophistication to manufacture a version of this kind and for it to be sustained under cross-examination. I find the suggestion made by Mkhwanazi that the police had found the keys and the revolver in the car and fabricated a version that a pointing out took place, to be highly improbable.

In regard to the available evidence the court had before it not only the evidence of the police witness Dlamini but also of the other policeman, Mamba. Their description of the events that took place

at the pointing out is supported in material respects by, the evidence of Sonnyboy who is the nephew of Mkhwanazi. He testified that he saw the two appellants at the homestead where he lived during the first week in April. He saw Mkhwanazi again on 9 April 1994 when he came with three or four police officers (which, it appears, included Dlamini and Mamba). He then deposed as to the events which took place during the pointing out and the recovery of the keys.

It was, however, during the cross-examination of this witness that some of the most serious interventions in the conduct of the trial occurred. As set out above, counsel for the appellants was repeatedly interrupted by the presiding Judge. He challenged the right of the cross-examiner to impugn the credibility of the witness on the ground that it was the defence case that the appellants were not present. For this reason he instructed him to put this to the witness and nothing else and directed him to desist from testing the reliability or credibility of the witnesses.

This was clearly improper. One of the ways in which the defence could cast doubt on the reliability of the Crown case that the appellants were present at the pointing out, was to highlight discrepancies between Sonnyboy's evidence and that of the police officers who were present. The trial Judge also curtailed the cross-examination of Sonnyboy as to a possible motive for the latter's wishing to falsely implicate Mkhwanazi, in order to test his credibility. Moreover, as also set out above, the trial Judge so interrupted Mr. Cele's argument on behalf of Mkhwanazi that he was at one stage constrained to cease his submissions altogether. Even thereafter when he resumed, the trial Judge did not allow him to argue that the evidence of Sonnyboy and the police was unreliable, admonishing him that he was insulting the police. Once again, this was, as pointed out by Welsh J.A. in Caiphas Dlamini's case a gross irregularity.

This Court must, however, consider whether despite the irregularities, the Crown has satisfied the Court that there has been no miscarriage of justice.

This court sitting as a Court of Appeal has to reassess the evidence without the benefit of an appropriate reliance on the findings of the Court below. It forfeits the advantage of a court of first instance that has had the opportunity of seeing and hearing the evidence at first hand. It is obliged to rely on the cold print of the written record. It must decide on such record whether a court, free of irregularity and properly instructed, would inevitably have convicted Mkhwanazi.

The manner in which the Judge curtailed cross-examination causes us grave concern - especially as we are obliged to assess this evidence without the benefit of reliable credibility findings and on cold print only.

The fact that fabrication is highly improbable and that the appellant is probably guilty does not in our view suffice. The Crown has to satisfy us that despite the grave irregularities it is safe to convict. In our view it is not.

The appellant Mkhwanazi did not, in our opinion, receive a fair trial. That he may well be guilty but yet goes free is attributable to the most unfortunate series of irregularities in the way in which the presiding Judge conducted the hearing.

The appeal in respect of the appellant Mkhwanazi therefore succeeds to this extent that we declare that a mis-trial has occurred and he is accordingly released. He can, however, be re-indicted should the Attorney General so direct.

In summary, therefore, while Masuku, like Mkhwanazi, did not have a fair trial, the evidence in his case also was insufficient to sustain a conviction. He is therefore found not guilty and acquitted. By

contrast in Mkhwanazi's case, we have declared that a mis-trial has occurred. He is therefore entitled to his release but can be re-indicted should the Attorney General so direct.

(Signed)

Tebbutt J.A.

(Signed)

Kotze' P. : I agree

(Signed)

Steyn J.A. : I agree