IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE

APPEAL CASE NO 18/1997

In the matter between

JAMES SIPHO DLAMINI

vs

Rex

Coram

Kotze, JP

Schreiner, JA

Browde, JA

For appellant

For Crown

Judgment

KotzÉ, JP

The appellant was tried, convicted and sentenced to death in the High Court by MATSEBULA J. on a charge of having murdered Timothy Mazini Xaba (the deceased) at Ntamakuphila during May, 1995.

He now appeals against both the conviction and sentence.

The cause of death of the deceased viz. massive head injury and mutilation of the body was not an issue. A police witness, Detective Constable Majawonke (PW7) described the condition of the body as seen by him behind the toilet of the Gamedze family on 7 May 1995 in gruesome detail: it was clothed in greenish trousers, white shirt, barefooted, with skull fractured without skin or hair, a skinned chest and a left arm missing from the armpit.

Several members of the Gamedze family testified on behalf of the Crown. The first was a young girl Phumaphi Lobesutfu (PW1). She testified that she was at the Siteki home of her mother and

father (respectively PW 2 and PW 3) on 2 May 1995 The appellant, also a Gamedze. arrived there during the afternoon accompanied by the deceased They asked for sleeping accommodation during the night from where they would depart the next morning for Bhambham to dig medicinal roots Each had a bag: appellant's was made of camouflage material and deceased's of black material. PW1 agreed to them placing their bags in her brother's hut where they would spend the night. PW1 further testified that appellant asked to borrow a knife but immediately changed his mind saying an axe would serve his purpose - ostensibly of digging for roots - better She then allowed him to borrow an axe which the family used for cutting wood. PW1 thereupon left the homestead to see a friend off at a nearby bus stop. On her return appellant and deceased told her they were going to Mzilikazi where appellant (an inyanga or traditional healer) wished to collect fees owing to him. Sometime later at

about 6 p.m. the mother of PW1 returned to the homestead and decided that the bags of appellant and deceased should be moved out of the hut of the brother of PW1 to a storeroom. At about 8 p m. appellant and deceased returned.

Towards the end of her evidence, PW1 pointed out an axe amongst the exhibits in the Court as the one which the appellant borrowed. She also identified a bag amongst the Court exhibits as deceased's black bag.

PW1 finally said that when she woke up early the next morning the appellant and deceased had already left the hut in which they slept.

Both PW2 and PW3 corroborated the evidence of their daughter PW1 that they were not present at their Siteki homestead when PW2 and PW3 allegedly called on 2 May.

Important evidence about a pair of brown shoes was given by Daniel Malaza (PW4), Sam Mathonsi (PW5) and deceased's brother, Simon Xaba (PW6). This evidence was uncontradicted and was to the effect that the appellant had sold PW4 these shoes on 6 May and that the Police fetched them in the company of appellant after his arrest which took place on 9 May.

Detective Inspector Dlamini (PW8) testified that on 7 May he received a report pursuant to which he found the deceased's body at the toilet at the Gamedze homestead and arrested the appellant on the aforesaid date. He cautioned appellant who asked leave to write a statement in his own handwriting.

He was asked what happened to the person who was with him. He replied that he fought with this person, that he hit him and that he died "accidentally". Thereafter appellant led him to Gamedze's homestead where articles of clothing were found in the toilet pit. He told PW8 that he kept the dead man's watch and handed it over to him. The learned trial Judge enquired from Mr. Magagula, who represented appellant, what his attitude to the statement was. He replied that he did not object to the evidence since the statement was exculpatory and not a confession.

The last Crown witness was Ephraim Ndlela (PW9). He is a landlord and knew deceased who was one of his tenants. He last saw him during May 1995 On that occasion the deceased told him he was going to Siteki with another person to dig out "muti" This person was pointed out to him but he could not recognise him due to bad light. It was on this journey that the deceased lost his life. Next day a man accompanied by a lady returned and said that he is the person who had left with Xaba (the deceased) and that he had left him behind digging. The "other person" was, beyond all reasonable doubt, the appellant.

The appellant testified in his own defence Briefly stated his version was chat although his main occupation was that of an "inyanga" he was also a trainer of security guards and that on 20 March 1995, despite the existence of some bad blood between the two of them. PW3 came to see him at his place of employment and asked him to "hire someone to guard his place" Pursuant to the said request he recruited the deceased and took him to "the place of PVV3 at Siteki They left between 9.30 and 10 p. m. on the night in question (May 2). Present were PW1. PW2, PW3 and a small child He introduced the deceased to them and then left on his own on the same day. He denied as "blue lies" any suggestion that he told PW1 that he and the deceased wanted to dig medicine the next morning at Bhambham and that she (PW1) provided a room in which "to put up for the night"

The above version is in conflict with that of PW1, 2 and 3, was rightly rejected and that of PW1, 2 and 3 rightly accepted by the trial Judge.

It is necessary to revert for a moment to the finding mentioned above that the "other person" referred to by PW9 was, beyond reasonable doubt, the appellant. It will be recalled that at the outset of this judgment reference was made to the evidence of PW1 that she was told that the two men said they intended to dig medicinal roots. If the appellant's version were true, i.e. that he merely came to introduce a "guard" and then left there could be no truth in the evidence of PW1 that they had come to

dig for roots. To believe the appellant or even to find that his evidence may reasonably possibly be true, one would have to make the far-fetched finding that the Gamedze family (i.e. PW1, 2 and 3) conspired to involve appellant in the death of the deceased. Destructive of a conspiracy theory are inter alia the following factors:

1. that PW2 would have made appellant and deceased change from the brother's room to the storeroom presupposes that this trivial detail would have been concocted,
2. the unlikelihood that PW1, 2 and 3 would give false evidence that PW3 was absent from the homestead for three successive days.

The evidence in regard to the pair of brown shoes is a decisive circumstance in establishing the guilt of appellant. The body of the deceased was properly clothed except that he was shoeless. This is consistent with the combined evidence of PW4, 5 and 6 that appellant had sold these shoes (the property of deceased) to PW4 on 6 May.

The circumstantial circumstances set out above are of crucial importance and destructive of the appellant's evidence.

The evidence of the pointing out to PW8 does not, in my view, call for a decision as to whether or not it was made freely and voluntarily. I consider that the evidence of PW1, 2 and 3 read with that of PW9 and the evidence relating to the shoes suffice to prove the guilt of the appellant beyond reasonable guilt. That the witnesses relating to the shoes could have been obtained as a result of an inadmissible pointing out is irrelevant. (See Sec. 227(2) of the Criminal Procedure and Evidence Act).

The suggestion was made during argument that relatives of the deceased might have murdered the deceased and left his body near the household covered with a sponge mattress. This, with

Respect, is an absurd suggestion. The evidence adduced at the trial and summarised above in my view establishes the guilt of the appellant beyond reasonable guilt.

I turn now to the appeal against the death sentence which the Court a quo imposed upon the appellant The all-important question in this regard is whether there were extenuating circumstances In a brief judgment entitled "Judgment on extenuating circumstances" the learned trial Judge introduced his remarks by saying - "the Court explained that the onus rests on an accused person to establish extenuating circumstances". He continued by stating "the accused has said what he wanted to say" and concluded by saying that the defence failed to establish the presence of extenuating circumstances. The record of the trial unfortunately does not reveal what the appellant did say. In the result it is by no means clear that the question has been properly and thoroughly investigated in the High Court. In particular it is not clear that the Court investigated whether the appellant who is art "inyanga" believes in witchcraft and whether such belief played a role in the commission of this crime.

In the circumstances I am of the view that the sentence should be set aside and the case remitted to the High Court for a proper investigation to be made and thereafter for the High Court to sentence the appellant afresh.

In the result the appeal against the conviction is dismissed and the conviction is confirmed. The appeal against the sentence of death is upheld and the matter is remitted to the Court a quo to fully investigate whether extenuating circumstances are present and thereafter to impose sentence afresh.

G.P.C KOTZÉ, JP

I AGREE

W. H. R. SCHREINER. JA

I AGREE

J. BROWDE. JA