

IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.. 34/1997

In the matter between:

**Charles Tsambokhulu
Philton Fakudze
Levy Shongwe**

**1st Appellant
2nd Appellant
3rd Appellant**

vs

Rex

Respondent

Coram

Kotze, JP
Tebbutt, JA

Browde, JA

For Appellants
For Crown

Mr. J.N. Hlophe
Mr. M. Nsibande

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JUDGMENT

(26/09/97)

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TEBBUTT, JA

Appellants were convicted by Mr. Justice Dunn in the High Court of murder with extenuating circumstances and each sentenced to 12 years imprisonment. They were found not guilty and acquitted on the related charge of kidnapping.

The charges arose from the death of an elderly widow Mrs. Edith Braun who lived on her own at Forbes Reef in the Hhohho District of Swaziland. Her

body was found on 5th of March 1994 in a forest near Luhhumaneni road in the same district. She had according to the postmortem report died of multiple injuries. These consisted of injuries caused by a blunt instrument described by the Pathologist as knobstick type injuries, a fracture of the jaw and bone of the neck. This was described by the Pathologist who carried out the postmortem examination as a classic example of manual strangulation. The lobe of her right ear had also been partially removed which was consistent with that having been cut with a sharp instrument. The deceased had during her lifetime kept in her possession certain old coins including some old three penny pieces known commonly when they were in use as Tikis and medals from the second world war for her late husband Mr. P.J. Braun. At the trial the evidence on which the crown relied for its case that it was the appellants who had killed the deceased was two fold. Firstly that the coins and medals mentioned were found in their possession and secondly that they had confessed to being the killers to certain Crown witnesses. As to the first of these aspects one Msunduzi Mndzebele testified that during March 1994 the 2nd appellant gave him two old Tikis which he said he would try to sell for him. While the first appellant's brother Anderson Tsambokhulu testified that 3rd appellant came to him with some medals which he asked Anderson to sell for him. The medals were engraved with the name P.J. Braun. On the 23rd of April, 1994 the 3rd appellant took the Police to his parental home where a plastic bag was fished out of a pit latrine. The bag contained 13 coins and two medals including a S.A. Nursing Council Medal which were identified by the deceased daughter as belonging to the deceased. As to the second aspect it would appear that one James Sibindzi had played a leading role in the event with which the appellants were charged. A girlfriend of his Bethusile Dlamini told the Court that the three appellants knew her boyfriend. During March 1994 second appellant

came to her home and told her that they had killed the deceased and that she should tell James to run away as the first appellant had been arrested and he might tell the Police what had happened. Michael Dlamini who describes himself as a Preacher and a Diviner testified that the three appellants and a fourth man had come to him. That fourth man was obviously Sibindzi. First appellant said that they were in trouble and needed Dlamini's assistance. Sibindzi said that this was because they had killed a white woman living at Forbes Reef whom they had intended only to rob but whom they had killed as they were afraid should would be able to identify them. They intended to flee from Swaziland but wanted to be cleansed so as to prevent the woman's spirit from haunting them and also to avoid detection by the Police. Dlamini said that the men were washed by him in the blood of a chicken mixed with some muti in order to cleanse them. First appellant told Dlamini that he was not involved. However first appellant brother Anderson to whom I have already referred said that the 1st appellant had confessed to the killing to him. 1st appellant had described how he with the other two appellants and James Sibindzi had killed the deceased and left her body in the forest. 1st appellant had told him that Sibindzi had struck the deceased with an axe. Anderson furthermore said that when 3rd appellant brought the medals to him he had also confessed to the murder of the deceased by Sibindzi and the three of them. All three appellants gave evidence that they had been tortured by the Police and interrogated about the coins and medals. As a result the Police went to Anderson and the stolen medals were found on him. According to the 1st appellant Anderson had told him that these medals had been stolen by him (Anderson) in a bakery. 2nd appellant said that he had told the Police of the coins which he had seen in Mndzebele's possession. 3rd appellant said that the coins found at the pit latrine belonged to his mother and she had thrown them

into the pit latrine. All the appellants denied having made the confessions testified to by the Crown witnesses or having visited the Diviner Michael Dlamini.

It is convenient at this stage to mention that following their arrest two of the three appellants, namely, number 1 and number 3 also made statements to a Magistrate. The admissibility of these statements was challenged at the trial on the basis that they were not made freely and voluntarily. After the trial within a trial the presiding judge ruled them to be inadmissible. These were of course not the confessions that the other Crown witnesses said that the appellants had made to them.

In a full, detailed and careful judgment the trial Judge rejected the appellants' stories and accepted the evidence of the Crown witnesses. The learned trial Judge said this - the evidence of the confessions by the accused to Anderson, Bethusile and Michael is in my view overwhelming. Accused No. 1 & 2 confessed to Anderson and this was coupled with the introduction of the medals by accused no. 3 and accused no. 1's attempt to explain knowledge of the medals by saying Anderson had come home with them after a robbery. Accused No. 2 confessed to Bethusile and I accept that he told Bethusile to tell Sibindzi to run away and that accused no. 1 had been arrested. The learned trial Judge said that Michael Dlamini had also been told of the murder and that he accepted the evidence of appellant no. 1's confession to Anderson. Mr. Hlophe who appeared for the appellants sought to attack the finding by the learned trial Judge submitting that the witnesses were not in fact credible. He submitted that Anderson had admitted to the Police that they had said that they would withdraw certain dagga charges and the theft charge against him if he testified at the trial of the three appellants. This is true but as pointed out by the learned trial Judge - "Anderson is the brother of accused no. 1 there could be no reason for him to implicate his brother in so serious a crime solely for the

reason of avoiding prosecution for the theft of a bicycle and possession of dagga. My brother Browde also pointed out during the argument that it is inconceivable that merely to avoid a charge of being in possession of dagga that a brother would wish to send his brother to the galoos. It was submitted further that Michael Dlamini's evidence was unreliable. This would involve a finding that he had concocted his entire story. This is so far fetched as not to be capable of being seriously considered. In any event the trial Court saw the witnesses and have made the finding of credibility and this Court will not interfere with that unless it is satisfied that he was wrong. I am not so satisfied. Mr. Hlophe also contended that Sibindzi was the principal perpetrator in the murder and that no common purpose involving the three appellants had been proved by the crown. It is clear from the confessions made by the appellants, and it must be remembered that they were made to different people at separate times that they were all participants in the robbery and the resultant killing. They confessed to Bethusile Dlamini, they confessed to Michael Dlamini and they confessed to the 1st appellant's brother. It was submitted that at the so-called cleansing that Sibindzi was the spokesman and that the others therefore were not involved in the confession. All the others were however present at the time while he was telling Dlamini what had happened. It was further submitted that Sibindzi had killed the deceased and that the others had played a minimal role. The evidence that the appellants had confessed to was that it was Sibindzi who had hit the deceased with an axe. However the postmortem reveals that the deceased had suffered twenty wounds on various parts of her body that she had been strangled, and that a lobe of her ear had been cut off. It is accordingly not necessary for me to deal with the other arguments advanced by Mr. Hlophe, namely, that the pointing out of the coins and badges by the appellants was inadmissible as they were not

freely and voluntarily made in that there had in fact not been a pointing out by the appellants to the Police at all and their own counsel at the trial was at pains to establish from the Police witnesses that in fact the appellants had not pointed out anything to the Police whatsoever. Mr. Hlophe said all that he could for the appellants. He came into the case at a late stage and he argued ably the little that he could advance in their favour. It is clear however that he was obliged to try to make concessions. The cardinal facts are that the deceased was killed and that at the time she was killed all the appellants were present, all took part in removing the body and dumping it in the forest, they shared the loot from the robbery, they all went to the Diviner to get cleansed of what they had done, and additionally they separately confessed to different people. It is clear that the crown has established beyond reasonable doubt that all three were participants in the robbing and killing of the deceased and that they were therefore rightly convicted of murder. As to the sentence of 12 years imprisonment, little can be said that this sentence was not an adequate one. This was a brutal killing of an elderly defenceless woman in order to achieve a robbery. A sentence of 12 years imprisonment in my view induces no sense of shock whatsoever and the appeal against the sentence must similarly fail.

In the result the appeal of all three appellants is dismissed and the convictions and sentences are confirmed.

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P.H. TEBBUTT, JA

I AGREE

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G.P.C. KOTZE, JP

AND SO DO I

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J. BROWDE, JA

