IN THE COURT OF APPEAL OF SWAZILAND

CRIMINAL APPEAL NO.40/97

In the matter between:

PALILOS RINESTO JAMBALI 1ST APPELLANT

PAUL MFANA NDZIMANDZE 2ND APPELLANT

and

THE KING RESPONDENT

CORAM : SCHREEVER J A

: LEON J A

: BROWDE J A

FOR THE APPELLANTS : IN PERSON

FOR THE RESPONDENT : MR. NSIBANDZE

JUDGMENT

Schreiner J A:

The two appellants were convicted of the killing of Obed Ndlanzi on the 31st October 1996 at or near Maphungwane. The first appellant was found guilty of murder with extenuating circumstances as was the second appellant. The first appellant was sentenced to imprisonment for ten years and the second appellant to eight years.

From the record it would appear that there was only one appeal, namely, that of the first appellant. However, when the matter was called, the second appellant entered the dock and indicated that he was also appealing. This was a most unsatisfactory state of affairs because the Court to which the matter had been allocated had been given the record of the case for consideration before the hearing. Naturally, it had concentrated on the evidence in relation to the guilt or innocence of the first appellant. However considerations of convenience led the Court to decide the appeals of both of the appellants. If possible, I would suggest that where more than

one persons is found guilty of an offence in the High Court and one of them notes an appeal, the other accused person or persons who were found guilty should be asked whether they too would like to appeal.

Now, a short statement of the facts. The body of the deceased was found in a ditch near some small holdings. He had a very severe head injury and his throat was cut. There was no evidence of an injury to either of the two appellants who were both young persons of apparently strong physique.

Themba Mbhamali who was treated as if he were an accomplice witness told the court, consisting of Mr. Justice Dunn, of an agreement to kill the wife of the deceased, Khabonina Maziya, and also the deceased because Maziya had caused the first appellant to be charged and convicted of stealing a chicken belonging to her. The deceased was also to be killed because of the fact, that being her husband, he was partially responsible for the chicken incident.

Whether the accomplice agreed to join in the attack upon the deceased and his wife is not clear. The learned Judge, while impressed generally by the accomplice witnesses' evidence, had some reservations about whether he did not in his testimony play down the part played by himself. Be that as it may, the learned Judge believed him to be an "honest and reliable witness" and relied upon his version of what he saw. The criticism of his evidence by the first appellant in his argument before this Court does not persuade me that the learned trial Judge was wrong in accepting his evidence as to the existence of a plan to kill the deceased and his wife. In his heads of argument the first appellant states that there being no corroboration of the evidence of the accomplice, this fact of a plot to kill should be rejected.

He continues,

"The truth of the matter is that the deceased got stabbed accidentally when a fight ensued following a heated argument over an issue in which the deceased's wife (PW4) accused me of stealing their chicken. I had gone to him to reason with him so as to clarify the issue of the said chicken which was sold to me by a certain boy who worked for him (the deceased). The deceased did not want to listen but instead threatened to beat me and a fight broke out. It was during the heat of such a moment that the deceased got stabbed and later died. It is therefore my contention that the deceased got killed accidentally."

The second appellant in his address to the Court also conceded that he and the first appellant had been responsible for the death of the deceased but criticised the conclusion of the trial court on the ground that it had not found a verdict of culpable homicide rather than murder

The problem facing the first appellant is that he gave evidence under oath. The relevant passage of the record is as follows:

"Evidence has been led against you in this court which sought to establish charge against you, do you know anything concerning the death of the deceased?

A1: I know nothing My Lord.

DC/A1: What do you mean when you say you know nothing?

A1: I mean that I never killed the deceased that is why I say I know nothing about his death."

A similar attitude was adopted by the second appellant. His evidence amounted also to a denial of any attack on the deceased or any fight which led to his accidental death.

The fact that the evidence given by neither appellant is remotely consistent with a situation where culpable homicide could be a proper verdict does not of course conclude the matter. The Crown has to establish that the correct verdict was one of murder rather than culpable homicide. The accomplice deposes merely to seeing the second appellant assaulting the deceased. Thereafter

he did not see the blows which led to the death of the deceased. Who inflicted the head wound and who inflicted the knife wound and whether there was a fight as now alleged by the first appellant were not seen by the accomplice. However the facts surrounding the death point clearly to a murder and not to some accidental wounding during the course of a quarrel. The High Court found, and there is no reason to disagree with it, that there was a plan to kill both the deceased's wife and the deceased himself and the presence of the two appellants at the small holding was to give effect to this plan. There were no wounds on the bodies of the appellants to suggest that there had been a fight resulting in the fatal wounds upon the deceased. The appellants were two young men and the deceased was much older. In these circumstances I am of the view that the possibility of an accidental death can safely be excluded from consideration. Though noone actually saw the attack I am of the view that a verdict of murder was correct.

The learned Judge found extenuating circumstances in the case of both the appellants. The sentences imposed upon the appellants appear to me to be, if anything, on the low scale. It was

a planned cowardly attack upon a person carrying on his agricultural activities who had himself done nothing whatsoever to deserve punishment. Ft is true that the appellants are young people and a substantial prison sentence is likely to affect them seriously. But society is entitled to require that a deliberate attack of the present nature should be visited with a substantial sentence.

The appeal against conviction and sentence is dismissed and the verdict of the High Court is confirmed.

W. H. R. SCHREINER J A

I agree:

R.N. LEON J A

I agree:

J BROWDE J A

Delivered this 27th day of April 1998