IN THE COURT OF APPEAL OF SWAZILAND

In the matter between:

JABULANE MATHABELA 1ST APPELLANT

BHEKI PIKININI MAKWAKWA 2ND APPELLANT

MUZI KHUMALO 3RD APPELLANT

and

THE KING RESPONDENT

CORAM : KOTZé J P

: SCHREINER J A

: STEYN J A

FOR THE APPELLANTS : IN PERSON

FOR THE RESPONDENT : MR. M. NSIBANDE

JUDGEMENT

Schreiner J A:

A decision in this matter was announced in Court on the 27th April 1998. The appeal in respect of the three appellants was upheld and the conviction and sentence of each was set aside. It was announced that reasons would be furnished at a later stage. The reasons are set out in what follows.

Appellant numbers one and three filed Notices of Appeal but the Second Appellant did not file any such notice. At the previous session of this Court in October 1997 it was decided that, as the guilt or innocence of the Second Appellant was very closely tied up with that of the First and Third Appellants, the matter should be dealt with as if the Second Appellant had noted an appeal. This does not mean that in the future such laxity will be overlooked.

The events giving rise to the appeals in this matter occurred on the 31st August 1992. The

Appellants were arrested on the 9th September 1992 and an indictment was drawn on the 14th January 1993. When the trial commenced does not appear from the record of the appeal, but the judgement in the matter delivered by Hull C J is dated the 14th March 1994. The record of the case occupies 1104 pages. The appeal was placed before this Court for the first time at the October session of 1997 and the matter was postponed to the session in April 1998 when it was heard and decided. While it must be conceded that a trial the record of which covers more than a thousand pages is a substantial one, the fact remains that a period of more than five years between arrest and hearing of the appeal has occurred which is far too lengthy to be acceptable.

A successful appellant may find, as in the present case, that he has served his sentence by the time his appeal is upheld.

The charges against the Appellants consisted of three of murder, one of attempted murder and one of robbery. The learned Chief Justice found the First Appellant guilty on the three counts of murder and the charge of robbery. He was acquitted on the attempted murder count. The Second and Third Appellants were acquitted on the murder and attempted murder counts, but were found guilty of robbery. The First Appellant was sentenced to life imprisonment on the murder counts and twelve years on the armed robbery charge. The sentences were to run concurrently and be calculated so as to take into account the period already spent in prison. The Second Appellant was sentenced to six years imprisonment to run from the date of incarceration. The Third Appellant received eight years to run from the date when he was first imprisoned.

The issue before the trial Court was whether any of the Appellants had been adequately identified as having taken part in the murders, attempted murder and robbery. The evidence established without doubt the elements of these crimes. It was only a question of whether it had been proved that each of the accused had taken part. It is not necessary therefore to go into details of the events of the night upon which the crimes were committed. A broad outline will suffice.

Mr. Elmon Nyoni was a businessman who lived in the Mphembekati area and owned a grocery shop and a transport (bus) business. On Monday the 31st August 1992 at about 7.30 in the evening Mr. Nyoni and his two sons, Welcome and Jerry, were counting the days takings from the bus operation. Having counted the money they put it in a "trunk box" together with a bag of

money collected from the shop. In total it amounted to El 260. The two boys then went out to warm water for the bath. When Welcome came back to get mineral water, his father gave him the keys of the bus and told him to park it in its appropriate place. The story is then taken up by Jerry, the other son, who was still sitting at the fire outside. As Welcome was going to move the bus, a person who was also standing by the fire produced a firearm telling Jerry and the other people at the fire not to move. He then went to Welcome who was moving the bus. He spoke Siswati like a Shangaan. He told Welcome that the two of them must go to the bedroom and he must give him money. Jerry ran away as soon as Welcome and the stranger started to go to the house. Jerry could not identify the stranger or describe any distinguishing feature. He merely said that he was wearing a dustcoat. It seems that Welcome started to run to the house, opened the front door, entered and slammed it in the face of the robber. The robber fired some shots to break the lock of the door and, fired a series of other shots to terrorise the inmates. Mr. Nyoni threw the trunk box out of the bedroom window and, when a voice outside demanded, he threw out some more money. When Mr. Nyoni examined the position after the robbers had left (it would seem that there were at least two) he found Welcome dead or dying and his wife, Priscilla, and his young servant, Maria Makwakwa badly injured. During the course of the shooting he himself was slightly injured by a shot which passed between his arm and his chest. Welcome, Priscilla and Maria were taken to hospital. Welcome was dead on arrival at the hospital and Priscilla and Maria died thereafter. Mr. Nyoni did not see the attackers.

As I have said, the three Appellants were arrested on the 9th September. This Court does not know what caused their arrest. At the time of the robbery there were a number of persons standing drinking in the neighbourhood of a fire. Be that as it may, the police version of what happened was straightforward. Detective Inspector Ndlangamandla who was in charge of the murder and robbery squad at Manzini Regional Headquarters, in the trial within a trial on the admissibility of alleged confessions by the three Appellants, deposed to having been present at the arrests and of having advised each of the Appellants that they were not obliged to say anything. However, anything they said would be taken down in writing and could be used in

evidence against them. He said that the Appellants under interrogation were very co-operative and when the position about confessions was explained to them they each asked to be taken before a judicial officer to make legally admissible confessions of their guilt. Broadly, the evidence of Inspector

Ndlangamandla regarding the arrests was confirmed by Constable Simelane though what happened thereafter is not dealt with by him because he, in the first instance, denied that he had been present during the interrogation and the request by the Appellants to confess to a Magistrate.

The State case is that, after some delay in finding magistrates available to take confessions, the three Appellants were each separately brought before them. The magistrates asked each of the Appellants separately the questions which by departmental instructions they are directed to put. They received answers which satisfied them that no force or undue influence had been exercised to cause the Appellants to make confessions. They recorded the confessions and the Appellants each signed them. The evidence of the taking of the confessions proves to me that no irregularities occurred in the recording of the confessions. This does not of course mean that the confessions were freely and voluntarily made because evidence of the events prior to the Appellants being taken before the magistrates may give rise to a reasonable possibility that the confessions, or some of them, may not have been freely and voluntarily made.

The appellants give a very different picture of what occurred when they were arrested. They all deny that they were cautioned on arrest. They tell stories of torture being applied to them in order to persuade them to tell to a judicial officer (whom they thought was a police official) a version of the events of the 31st August 1992 which had been conveyed to them and made up by the police. All of them paint a picture of being alone at separate police stations and not in communication with one another. They all say that they were periodically taken out of their cells into an office where there were police officers under the command of Ndlangamandla. These officers consisted of one or more of Vilakati, Shongwe and Simelane. They all started off by denying any knowledge of the crimes.

The First Appellant says that Shongwe and Simelane held him very tightly and shook him. Then Ndlangamandla told them to handcuff him between his legs and forced him to stand upright causing painful pressure on his private parts. He was then introduced to what was termed their "special tv." This consisted of a piece of rubber cut from the tube of a tyre. Simelane and Shongwe covered the victim's nose and mouth with this rubber so that he was unable to breathe and eventually he "lost energy." The police had to remove the handcuffs and the tube from his

face. He could not refrain from urinating. As they were torturing him they kept on telling him about the day the offence was committed. He was then taken back to his cell. Later the same morning he was taken back to the office, questioned about the case and told by the police how it was committed. He continued to say that he did not know about it. Ndlangamandla then said, if he continued with his stubbornness, they (presumably Shongwe and Simelane) should handcuff him again. They made him lie down on a bench facing upwards and one stood on his foot and the other on his chest. He continued to deny knowledge. They then took off the handcuffs and told Mm that if he did not confess they would do the same thing to him again. He was later taken back to the cell and, on the third occasion when he was brought back to the office, the rubber tubing torture was applied again. He seems to have defecated. He was told to have a bath after which he stayed for some time and he was taken back to Sidvokodvo after he had been told that tomorrow he must "tell them the proper word."

On the following day, the 10th September (there seems to have been a dispute as to the correct date) the First Appellant said Ndlangamandla told them there was a place that they had to visit. The Second and Third Appellants were brought in. They were driven in a car to a river in the Sicelwint area with Shongwe and Simelane. The river was in a donga and the water could be heard, though the river itself was obscured by the foliage in the donga. Ndlangamandla, who had also come, walked from the cars to the edge of the donga with the three Appellants and Shongwe and Simelane behind. Ndlangamandla went down into the donga while the others stayed on the top of the bank. He returned with the "trunk box". This box seems to be a foot long and seven inches high. It was identified by Mr. Nyoni as being the box which he threw out of the window when the robbery occurred.

This evidence of the First Appellant concerning the finding of the trunk box was corroborated by the other two Appellants but the Crown evidence was to the effect that the Appellants led the party to the place where the box was lying first by directing the driver of the car. When they got out of the car, the three Appellants walked in line abreast to where the box was lying in the undergrowth. Simultaneously the Appellants pointed out where it lay. Neither Ndlangamandla nor Simelane who were the only policemen who gave evidence in the trial within a trial was prepared to say which of the Appellants was first in pointing out the position of the trunk box.

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The trunk box expedition will be dealt with further when I come to deal with the judgment of Hull CJ.

There was also at this time a trip to the homestead of the Second Appellant and a search of his room. Nothing was found which assisted the Crown's case in implicating the First Appellant in the crimes save possibly for a dustcoat which was found in his bedroom. If the dustcoat had been an unusual form of dress or had some peculiar features which had been noticed by Jerry when a robber had stood by the fire on the night in question and thereafter threatened Welcome, significance may have been attached to it, but I believe that the dustcoat is a common form of dress in Southern Africa and the Court would not be justified in ignoring this fact. It is the kind of circumstance of which a Court may take judicial notice. (As to the circumstances in which judicial notice may be taken by a Court, see HOFFMANN AND ZEFFERT; THE SOUTH AFRICA LAW OF EVIDENCE 4TH EDUCATION CHAPTER 18 PP.415 ET SEQ.) In the present case it is sufficient to say positively that as a matter of fact wearing a dustcoat by a man without distinguishing features is not in itself a material piece of evidence going to assist in identification of the wearer.

The evidence given by the Second Appellant is in general outline similar to that of the First Appellant - torture by the use of handcuffs and the use of the rubber from a motor car tyre while telling the victim what story he has to tell and the procedure of bringing him from his place of detention to another place, "interrogating" him and then talcing him back to his place of detention. The Second Appellant also claims that he was assaulted with a sjambok by Simelane in the presence of Ndlangamandla, Shongwe and Vilakati. He indicated lateral marks (shadows) on the right hand side of his body from the left of his navel reaching up to just below his right breast. The learned Judge was not convinced that the marks were significant and were evidence of a physical assault with a sjambok. The same finding was made in regard to marks on the arms of the Second Appellant which he stated were caused by tightening of the handcuffs around his wrists. He told a story concerning the so-called pointing out which was similar to that of the First Appellant.

The Third Appellant says that he was arrested with two of his brothers but that they were

parated soon after arrest. He speaks of the torture with handcuffs and tyre rubber over Ms face and teaching him what to say to the magistrate.

All the Appellants claim to have been misled as to whether the official before whom they were brought was or was not a police official. The First Appellant said that the policeman who brought him to make his statement bowed and saluted the official. In the light of my conclusion in this matter it is not necessary to decide whether indeed all three Appellants believed that the magistrates to whom they were taken were police official or other officials unconnected with the police. All that need be said here is that care should be taken by magistrates and police to ensure that a person who is brought before them for the purpose of making a statement should be clearly told that the person who is taking their statement is not connected with the police and is employed by the State as a judicial officer only.

After the evidence of the defence in the trial within a trial had been completed the learned Chief Justice, in order it would seem to confirm a view that he had prima facie formed, called a number of witnesses to produce records for various police lock-ups in order to test the accuracy of the witnesses as to when the Appellants were taken for interrogation and for pointing out outside the police lock-ups. This attempt failed because it was conceded at the outset that the records in this regard were not to be relied on. These records showing when detained persons were taken into custody at a particular place and when they were taken to another place for interrogation or for other purposes connected with interrogation should have been kept with care and accuracy, Their purpose is inter alia to enable the Court and the authorities to trace the movement of a prisoner throughout his detention.

In his interlocutory ruling the learned Chief Justice stated that he would give "full reasons" when he gave his judgment on the case as a whole. However, certain important statements were made at this stage. He said:

"On the real point in issue which is whether they were tortured and threatened I believe the evidence of Inspector Ndlangamandla."

and

"I don't believe their [the Appellants] accounts as to what happened.... What I mean is that

I don't believe that they were tortured and threatened in the way that they claim to have been and that that was what led them to go and see a magistrate and make a confession."

The learned Chief Justice then makes the following finding:

"I do wish to say, and I say it for the record, I don't think it really weighs on this, bears on this on end [sic] that I think there is at least a reasonable possibility and in fact I put it more strongly that in fact Detective Constable Simelane was part of the police team, he went and got them (presumably the Appellants) brought them back and interviewed them. But to go further than that I say that it probably was the case. I think that probably was the case.... It does not follow that the accounts of the accused were therefore true as to what happened by way of duress being exercised against them. And, on the whole of the evidence I don't believe their accounts are true..... The reality is that what this hearing on the voir dire has been about is whether or not it is reasonably possible that the three accused were tortured, threatened and told what to say. And

accordingly I will rule that evidence as to the contents of the alleged confessions is admissible and may be admitted."

The above passage indicates that the learned Chief Justice was approaching the question of the admissibility of the confessions from the wrong point of view. Instead of asking himself the question: Were the accounts of the Appellants true, he should have first enquired as to whether he could say that the accounts of the State witnesses were sufficiently reliable to be able to place credence upon what they said. The fact that the learned Judge did not believe the evidence of the Appellants can be relevant only to support a finding that the State witnesses were telling the truth.

In his final judgment the learned Chief Justice deals again with the question of the admissibility of the confessions. He refers to the fact that he was "not satisfied that Constable Simelane did not participate in the questioning" and he "thought that he had probably done so." He also says in regard to the pointing out expedition that he was "not persuaded that the three men proceeded simultaneously from the vehicle to the river bed..... In the way of things first of all it was unlikely that in the circumstances each of the three men would have proceeded simultaneously and directly towards the bed of the river where the trunk box was recovered." Notwithstanding the above the learned Judge reaches a different and speculative conclusion:

"I believe that the truth is, as the Inspector has said, each of the accused during the course of the interrogation referred to the existence of the trunk box that had been abandoned at a river bed and as a result they led him to that spot where such trunk box was discovered by the police. I said this to infer on the whole of the evidence and I do infer that each of them knew where the box was and that each of them did play a part in leading the police to the spot."

It seems to me that the learned Chief Justice by the above statement reveals that he is relying upon

what he considered should have been the evidence and not what it was. It avoids the absurd picture of the Appellants marching three abreast to the place where the box lay and simultaneously pointing it out to the police who were present. He translates this patently improbable story into one where the Appellants each played some undefined part in leading the police to where the box lay, This is not a correct judicial approach. The Court must deal with the evidence as it is presented. The Crown's evidence of the pointing out should have been rejected and, more importantly, the whole of the evidence of Ndlangamandla should have been considered suspect,

A very significant aspect of the trial within a trial which does not feature in the judgment of the Court is the fact that the Crown did not see fit to call the police witnesses Vilakati and Shongwe who were in one way or another both concerned in the arrests and interrogation of the Appellants. What they would have said is not known, but if Ndlangamandla and Simelane were to have told the truth it was important that the remaining policeman should have been called and their evidence subjected to testing by cross-examination.

The omission of Vilakati and Shongwe from the list of Crown witnesses may also have some connection with the attempt to limit or exclude Simelane's knowledge as to what happened during the interrogation of the Appellants, This aspect of the trial within a trial is of the utmost importance. It cannot be dismissed simply by saying that, contrary to Ndlangamandla's evidence and most of Simelane's, Simelane probably was present at some part of the interrogation. If the Crown's evidence is found to be false in this regard, the Court would be justified in refusing to rely upon it at all.

Inspector Ndlangamandla, dealing in broad terms with his investigating team and who was present throughout the investigations said, "At the time I used to be reinforced by one Constable Simelane." However under cross-examination the following was said:

"Shabangu: Did you, were you assisted at any stage of your interrogation of the three accused by Inspector Simelane or Mr. Simelane, a police officer?

PW5: Not at all My Lord.

Attorney Shabangu: Inspector Simelane was it?

Judge: Inspector Simelane, was it?

PW5: Ether Inspector Simelane or Mr. Simelane.

Judge: Or?

PW5: Or Mr. Simelane.

Judge: Yes?

Attorney Shabangu: I put it to you that Accused No.3 will say that at some stage during your assaults on him you were assisted by this Mr, Simelane who (incomprehensible) to the magistrate.

PW5: I deny that. If I could remember well, My Lord, in those days that was during the trade festival so Inspector Simelane was assigned to the trade festival duties, he was never around in Regional Headquarters.

Judge: Yes?

PW5: Inspector Simelane especially, he was assigned to the trade fair duties, he was never at the Regional Headquarters that day.

Attorney Shabangu: So, if you are saying that Inspector Simelane was nowhere near the police station to assist you, who is this other, who is this other Simelane who later took Accused No.3 to the magistrate?

PW5: I am sorry My Lord. I am rather confused now. It would appear that the defence now want to seek the information from me. He has directly told me that I was with Inspector Simelane. I answered the question. Now he is trying to absorb [sic] the information from me to say who was the other Simelane who was with me because he knows he has been directly instructed to say I was with Inspector Simelane.

Judge: Right The question as I understand it is, which officer called Simelane was it who took the third accused to the Magistrate?

PW5: That was Constable Simelane. Not Inspector,

Attorney Shabangu: I put it to you then Mr. Ndlangamandla that it is the same Simelane who in fact assisted you when you were interrogating the third accused.

PW5: I deny that My Lord, he never participated during the interrogation because he was based at the police station and the interrogation was conducted at the Regional Headquarters.

Attorney Shahangu: But did you not say that in your evidence in chief that at times during the interrogation of this case you were reinforced by Constable Simelane, Did you not say that?

PW5: I did say that My Lord during the.....

Judge: Did or did not?

PW5: I did say that, during the arrest of the suspect I was reinforced by Constable Simelane, because My Lord, he also had an interest because he was looking for Accused No.3's brother for a housebreaking and theft matter.

Attorney Shabangu: Ja, Inspector, your actual words were that at times you were reinforced by Constable Simelane. That suggests that on a number of occasions, as opposed to meaning the time when you arrested him.

PW5: That is true My Lord because, well the Accused were arrested separately - not at once."

It would seem prima facie from the above passage that Inspector Ndlangamandla made a deliberate attempt to confuse the issue by introducing an Inspector Simelane whose duties at the time were at the trade festival knowing full well that Appellant No.3's Attorney's interest lay in Constable Simelane who took Appellant No.3 to the magistrate.

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However the matter is carried further by the evidence of Detective Constable Casper Simelane who was at the relevant time stationed at Manzini Police Station. Asked by Crown Counsel whether he ever took part in investigating two or three counts of murder, one count of attempted murder and robbery he answered: "I never investigated such offences My Lord," He did admit taking the Third Appellant to the magistrate for the purpose of making a statement He then denies that any torture or violence took place. He also admitted under cross-examination that he interrogated all the Appellants but says that he confined this to the housebreaking and theft case. Speaking about his visit to the Manzini Regional Headquarters and finding (he accused persons there he states that it was in order to find an exhibit in the housebreaking and theft case. Then follows the following passage:

"Attorney Cele: So it was there that you also questioned the accused persons about the recovery of the exhibits that you wanted?

PW6: I did question them about my exhibits My Lord,

Attorney Cele: So why were you denying that you never fever) interrogated these persons?

PW6: My Lord I never interrogated them on the murder cases. My Lord, only on the housebreaking and theft cases.

Attorney Cele: So Ndlangamandla will tell you I am over, start now, Simelane?

PW6: That is correct My Lord."

The involvement of Simelane in the interrogation has come a long way since the commencement of the evidence of Inspector Ndlangamandla. I am of the view that it is clear that Inspector Ndlangamandla and Constable Simelane were deliberately trying to cor ceal from the Court the involvement of the latter, If successful it could have meant that on this ground the evidence of the appellants could be rejected out of hand. The Appellants all placed Simelane in the centre of the torture scene.

Having in a somewhat tentative fashion doubted the veracity of the Crown witnesses as to the presence of Simelane at the interrogation the learned Chief Justice fails to take the next step of holding that the Court should not accept the evidence of the Crown concerning the willingness of all the Appellants to confess and the absence of torture or duress during the interrogation. No reason for the exclusion of Simelane from the interrogation team can be given save that it was intended that the evidence of Inspector Ndlangamandla should stand alone without any possible conflict with the evidence of other police officers, and that the Appellants version of events should be proved to be untruthful. This attempt has not been successful.

In summary I conclude as follows:-

1. The Court a quo erred in not giving due weight to the falsity of the evidence of the police witnesses concerning the presence of Constable Simelane during the interrogation of the three Appellants on the charges of murder and robbery.

2. The Court a quo also failed to consider the significance of the palpably false evidence of the police officers concerning the alleged pointing of the "trunk box". In addition no incriminating inferences could be attached to the pointing out as the identity of the person who pointed out remains unestablished. The evidence that all three Appellants did so simultaneously was as I indicated above clearly false and. unacceptable.

3. In these circumstances the Court a quo should at least have had a reasonable doubt as to whether the confessions of the three Appellants were made fairly and voluntarily. They were therefore inadmissible in evidence against them.

It was common cause that, without the confessions, there was not sufficient evidence to justify a conviction of any of the Appellants. It follows that the appeals succeeded and the convictions and sentences were set aside.

W. H. R. SCHREINER J A

I agree:

G. P. C. KOTZé J P

I agree:

J.H. STEYN J A

Delivered on.....