

IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO. 22/98

IN THE MATTER BETWEEN:

MAKHUNGU SAMSON SHONGWE APPELLANT

And

REX

CORAM : SCHREINER, A J P

: VAN DEN HEEVER, A J A

: SHREARER, A J A

JUDGMENT

SHEARER. A. J. A.

This appeal is directed against the conviction of the appellant on a charge of murdering CHRISTINAH BHEMBE on the 7th January 1997, while acting in common purpose with NOAH MKHUMBI MOTSA and JULY ZULU. He was convicted and was sentenced to seven (7) years imprisonment. He appeals against both conviction and sentence.

In his grounds of appeal he stated:

"I pleaded not guilty although I was present when the murder took place but I did not take any part".

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As the trial progressed it became clear that most of the facts were common cause between the Crown and the Defence, in particular that

1. The appellant believed that, by the exercise of witchcraft, the deceased, a woman of mature years, had occasioned the death of his uncle and aunt;
2. The appellant and others, including the prosecution witness Noah Motsa had during the night of 7th January 1997 gone to the house of the deceased at STINDOLOBHA. One of the party had a firearm. It was a house of two rooms, and initially the visiting party tried to attract the attention of the deceased by knocking. When this failed a window was broken and a shot fired through the window which wounded the deceased. She died from those wounds. The deceased's daughter-in-law Sibongile Nkambule was also in the room. She was a prosecution witness.
3. The reason for the attack was the accused's belief that the deceased was responsible for the death of his relatives.
4. The appellant had obtained the services of a trained hitman to shoot the deceased. The person who fired the shot was July Zulu, who was not before the Court.

The deceased's daughter-in-law gave evidence of the fatal evening and then Noah Motsa was called as a prosecution witness. He gave evidence designed to exculpate himself and was dropped by the prosecution. Evidence of a confession by the appellant to a Magistrate was led, and contested by the Defence on the ground that it had been prompted by police

"insults", but this confession was eventually and correctly ruled as admissible by the trial judge. The appellant gave evidence - an account which on all material points accorded with the text of the confession. He was a party to the plan to kill the deceased and was present when the plan was put into action.

It is perfectly plain that the appellant's account of psychic experiences which persuaded him that the deceased was responsible for the death of his relatives prompted him to plan the killing, and that he, although not himself armed, was part of the execution party. He argued his appeal in person and contended that since he had not performed the aggressive act himself he was entitled to an acquittal. This had

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been correctly rejected by the trial judge, and was not pressed strenuously on appeal, the appellant concentrating on the sentence.

In sentencing the appellant the trial judge took into account all the mitigating circumstances, including, perhaps over-generously, that the appellant, prompted by a leading question, said the idea of this killing originated with the appellant's brother Zeblon. He had earlier said that the motive was revenge. That the appellant feared some personal harm was assumed in his favour.

The conviction is in order and must be confirmed. If there is any misdirection in sentencing the appellant, it was in his favour and the sentence, if it errs at all, errs on the side of moderation.

I propose that the appeal be dismissed and that the conviction and sentence of the appellant be confirmed.

D. L. L SHEARER, A. J. A.

I agree

W. H. R. SCHREINER, A. J. P.

I agree

L. V. D. HEEVER, A. J. A.

Delivered in open court on the June 1999