IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE Appeal Case No. CA8/2000

In the matter between:

KHEKHE SIMELANE & FOUR OTHERS Appellants

Versus

REX Respondent

Coram Leon, JP

Tebbutt, J A

Shearer, J A

For Appellants Mr. B.J. Simelane for 1st, 2nd, 3rd

& 5th appellants & Mr. E. Twala

for 4th appellant

For Respondent Mr. M. Mabila

JUDGMENT

LEON, JP

It will be convenient to refer to the five appellants, as they were in the Court a quo, as the accused. They appeared before the High Court on two charges: Count 1 was the alleged murder of George Simelane while Count 2 was malicious injury to property, i.e. the deceased's house.

All the accused pleaded not guilty to both counts but were found guilty as charged.

Accused Nos. 1 and 2 were sentenced to ten years' imprisonment on Count 1 and two years' imprisonment on Count 2. The sentences were back-dated to the time of their arrest (29 August 1998) and were ordered to run concurrently.

Accused Nos. 3, 4 and 5 were sentenced to seven years' imprisonment on Count 1 and to two years' imprisonment on Count 2. The sentences were backdated in the same manner and were also ordered to run concurrently.

The learned Judge has given a detailed judgment which it is not necessary to repeat. I shall refer briefly to the background to this case and to the nature of the evidence.

Accused Nos. 1, 2, 3 and 5 are brothers while accused No. 4 is their cousin. The deceased was the uncle of accused numbers 1, 2, 3 & 5 while the main Crown witness Rejoice Simelane is the aunt of the four accused and the cousin of accused No. 4 having been married to the deceased.

Accused Nos. 1, 2, 3 and 5 had a brother named France and a sister Ivy. Both died young. France committed suicide while Ivy died after being ill. There is some evidence that they may have died in mysterious circumstances.

However that may be, the motive for the killing appears from the evidence of PW1 whose evidence suggested that all the accused believed that the deceased was a wizard who was responsible for the death of

France and Ivy. That is why the court a quo found extenuating circumstances to be present.

The Crown case against the accused amounts to the following, very briefly stated. PW1 knew the accused and their voices very well. They had grown up with her in the same homestead and only moved elsewhere when they secured employment. She called them her children and the accused agreed with that description.

On the evening of the murder, the 27 th August 1998, she had taken water to the deceased to wash himself. She heard a noise. Stones were thrown at the roof of their house and at the windows which were shattered. Voiced shouted, "Come out so we can kill you." They asked, "Where is Ivy and where is France?" They hit the door until it broke open. The voices shouted, "Come out, George, so that we can kill you." PW1 escaped through a window, shouting; a voice shouted back, "Voetsak." Later she returned to the house - the deceased was not there but she followed his footmarks to a donga where she found the deceased dead with numerous injuries.

She said that she saw all the accused at the door and although the light could not have been good, she identified each of them by their voices. She said, "they are my children and have grown up under me." She noticed the accused carrying sticks, knobsticks and stones at the doors. She saw the knobsticks being held in a fighting position but did not see what was being carried in the other hands.

In her evidence she said that the relationship between her and the accused was "no more good" but she was clearly referring to the time since the deceased's death.

She did not deviate from her evidence in cross-examination. In my view she was a most impressive witness and I reach this conclusion notwithstanding the arguments by counsel for the appellants to which I shall later refer.

The post-mortem report was handed in by consent. It revealed that the deceased had a laceration over the scalp and multiple penetrating injuries involving the lung, heart and intestines causing haemorrhage from which he died.

Thomas Ndlovu (PW2) gave evidence against accused No. 3. He is a supervisor at Guys & Sons Bus Services and he also assists in giving medication to children.

On a Saturday, on his way to his Chief's kraal, he met accused No. 3 who said that he was

coming to see him for his assistance as he knows him to be a traditional healer. Accused No. 3 told him that he and others whom he named had killed the deceased George Simelane with a spear at his homestead because the deceased had killed his aunt. PW2 reported this at the Chief's kraal. It was put to him in cross-examination that accused No. 3 would say that he, PW2, was the first to speak and he had said, "nephew you had done a good job by killing George the witch." That allegation was denied as being totally false. PW2 thought that his assistance had been sought because he had "helped in some criminal matters."

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An 18 year - old youth Dumisane Simelane testified as PW3. He is related to all the accused and he knew the deceased. On 27 August 1998 he saw accused No. 4 enter his sleeping house while the witness went to the kitchen to see his mother. Accused No. 3's voice called out for accused No. 4 three times saying: "You are not coming out because at your homestead people don't die, at my homestead they die." He went to look for accused No. 4 who had disappeared. Accused No. 3 pushed the door open carrying a spear saying he had come from killing George Simelane. The spear had bloodstains. In cross-examination it was put that accused No. 3 would deny that he ever went to the witness's house.

Phineas Dlamini was PW4. The deceased was his cousin and he is related to all the accused. At the material time he said that he had come from Nkondolo when he was passed by the accused, No. 3 who poked at him with a stick. Accused No. 3 asked him to what area he belonged. They then disappeared. He became nervous and shouted to the deceased's home which was nearby that the deceased should get dressed. PW4 was a community policeman. He was certain that accused Nos. 1 and 5 were among those who passed him but was not sure about No. 4. After they had passed he heard the noise of something landing on corrugated iron sheets and the breaking of glass and a door. Shortly after that he saw PW1 running crying and rushing into his house. He went back to the house with PW1, found the windows and the door broken and the deceased was not there. He sent a message to the police and the deceased's body was found the following day in a donga. His identification is subject to the criticism that he wrongly identified one Nono as part of the group and he was not sure about accused No. 4.

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Detective Sergeant Sibandze, PW5, together with other police officers found the body of the deceased in a donga. He saw that he had wounds inflicted with sharp instruments, knobkerries and sticks. There were multiple injuries. Near the body they found two spears and broken sticks. Accused No. 1 took the police to his house where he pointed out a spear and two knobsticks. They then arrested accused No. 2, 3 and 4. At the police station accused Nos. 1, 2 and 3 pointed out the exhibits which were already at the charge office (spears, sticks, et cetera). They then arrested accused No. 5.

With regard to the pointing out he said that accused No. 1 had pointed out a spear, a stick and a knobstick, accused No. 3 two spears and a knobstick, accused No. 4 a straight stick and accused No. 5 a knobstick.

The trousers of accused No. 3 had bloodstains on them.

He said that all the accused were cautioned. This was hotly disputed in cross-examination when it was also suggested that the accused had been suffocated with a tube and beaten up. When the accused gave evidence they also claimed to have been throttled but this was not put in cross-examination. It was also put in cross-examination that accused No. 3 had told him that the bloodstains were from a goat which he pointed out but PW5 had no recollection of that.

Constable Ndzimandze was PW6. He said that he and other policemen had retrieved a large spear, a knobstick and a straight stick from accused No. 1 who pointed them out. Accused No. 2 produced stones. Accused No. 3 had two spears and a knobstick. Accused No. 4 had two sticks and a knobstick. They found nothing on accused No. 5.

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He said that he kept a notebook where all this was recorded but he had started a new one and the old one disappeared with the exhibits. He too denied that any force had been used against the accused stating that they had all been cautioned on more than one occasion.

The defence of each of the accused, and they all gave evidence under oath, was precisely the same. They denied all knowledge of the crimes stating that they were at home at the time in question.

They all testified that all the Crown witnesses were liars and that they had been viciously assaulted by the police. No defence witnesses were called.

The trial judge found that all the Crown witnesses were reliable and was particularly impressed by the evidence of the deceased's wife, PW1.

As appears from the aforegoing the case against accused number 3 is stronger than that of the case against the other accused. With regard to the latter, the case against them depends upon the evidence of PW1 together with the evidence relating to the pointing out. The court a quo did not rely upon the pointing out at the police station and there are some further criticisms which may be levelled against that evidence. I am prepared to assume, in favour of accused numbers 1,2,4 and 5 that the case against them depends on the evidence of a single witness, namely PW1.

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It was contended on behalf of the appellants that the evidence of a single witness must be approached with caution and that such evidence should not be accepted unless it is satisfactory in all material respects. (see R vs Mokoena 1932 OPD 79 at P 80).

That judgment must yield to the more modern approach which has been followed in a number of cases such as R vs Abdoorham, 1954(3) SA 163 (IV) at 165, S v T 1958(2) SA 676 (A) at page 678 and particularly in S vs SAULS and Others 1981 (3) SA 172(A) at 180 E - G. In SAULS' case Diemont J.A. said this SUPRA CIT:-

"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff J.A. in S v WEBBER 1971 (3) SA 754 (A) at 758)."

"The trial judge will weigh his evidence and consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by de Villiers JP in 1932 (the first Mokoena case) may be a guide to a right decision but it does not mean,

"that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded (per Schreiner J A in R v Nhlapo (AD 10 November 1952) quoted in R v Bellingham 1955(2) SA 566(A) at 569). It has been

said more than once that the exercise of caution must not be allowed to displace the exercise of common sense. "

That decision was a decision of the Appellate Division in South Africa, is plainly right and must be applied and followed by this court.

Both counsel for the appellants advanced lengthy arguments as to why the evidence of PW1 should not be accepted. They include the point that she was frightened, that it was dark and that she could not describe the clothes worn by the accused. Moreover they contended that her evidence of voice identification was unreliable.

I have considered these and the other arguments which were advanced on behalf of the accused but I am unpersuaded that the trial court erred in accepting her evidence.

It is true that PW1 did not describe the clothes worn by the accused but there is no reason why she should have done so. She knew the accused and their voices: that is the important point. It is also true that it was dark but there was light enough for PW1 to see the accused and the weapons which they were carrying for she saw them at the front door. Her fright might well have heightened her perception. While she did not describe precisely what she heard each accused say she heard enough: she heard the accused calling each other by their names and singing in unison.

What is a most important point in this case is that PW1 regarded the accused as "her children" and they agreed with that description. As I have mentioned earlier they had grown up in her homestead and she

would inevitably have known their voices extremely well. In general it may be said that a court should approach voice identification with circumspection for it in some cases it may not be reliable, but this is a special case where the evidence on this point, for the reasons stated, is very strong and she saw them as well.

It was not suggested in argument that PW1 was a dishonest witness but it was argued that she may have been mistaken. I am not persuaded that she was. Moreover the court a quo had the advantage of seeing and hearing the evidence, an advantage not enjoyed by this court.

Finally I should add this. The evidence of PW1 is inherently probable, it hangs together with other relevant crown evidence and it provides the motive for the killing. The accuseds' evidence was that of a bare denial and the trial court having heard their evidence rejected it as false. I see no reason to disagree.

In my judgment the trial court did not misdirect itself in any way and there is certainly no basis for holding that one can be satisfied that it was wrong.

No argument was advanced on sentence.

The appeal must be dismissed and the convictions and sentences confirmed.

LEON, JP

I AGREE:

TEBBUTT, J A

I AGREE:

SHEARER, J A

Dated at MBABANE this 12th.....day of December, 2000