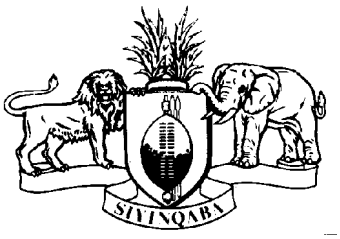


# IN THE COURT OF APPEAL OF SWAZILAND

**APPEAL CASE NO.5/99**

**In the matter between:**

| | | |
|---|---|---|
| **KENCE NICHOLAS VILAKATI** | | **1ST APPELLANT** |
| **SOLOMON DUBE** | | **2ND APPELLANT** |
| **AND** | | |
| **REX** | | **RESPONDENT** |
| **CORAM** | **:** | **BROWDE JA** |
| | **:** | **STEYN JA** |
| | **:** | **TEBBUTT JA** |
| **FOR THE 1ST APPELLANT** | **:** | **IN PERSON** |
| **FOR THE 2ND APPELLANT** | **:** | **IN PERSON** |
| **FOR THE RESPONDENT** | **:** | **MS. DLAMINI** |

**JUDGMENT**

Tebbutt JA:

On 7th December 1997 at Mthombe area, Shiselweni Region, the deceased, Musa Nhlabatsi, was severely assaulted, suffering in particular serious head wounds, from which he died in the Mbabane Government Hospital on 25th December 1997.

The two appellants were alleged to be his assailants and were tried for murder before Maphalala J in the High Court. They were convicted of murder with extenuating circumstances and were each sentenced to eight years imprisonment. They have now appealed to this court against both their convictions and their sentences.

On the day of the assault the deceased was drinking traditional beer with some other men at the house of one Magwence in the Mthombe area. One of the men was the second appellant; another was one Magameni Shongwe who was PW1 at the trial. At about sundown the deceased left the house for his own home. The second appellant followed him. Later the former returned and told the others that "they had killed a dog." At their insistence the second appellant took them to a place where they found the deceased lying severely injured. The police were called and they had the deceased removed to hospital.

The medical evidence both from the doctor who attended to him on his admission to Mbabane Government Hospital and from the pathologist who conducted the post-mortem examination of the deceased was that he had head wounds including lacerations and a fracture of the skull on the right hand side and a fracture of the lower jaw bone on the left. The lacerations could have been caused by something like a bush-knife and the head injuries by a blunt instrument applied with great force, such as a stick or sjambok.

The only witness who testified to having seen the actual assault is PW1. He said that when the second appellant followed the deceased on his way home, the first appellant came from a different direction and attacked the deceased by hacking him with a bush-knife he was carrying. The second appellant assaulted the deceased with a sjambok. The deceased tried to run away but the first appellant threw a stone at him that hit him on the ankle. The deceased fell down and the two appellants continued to assault him. PW1 said that when they went to the place where the deceased was lying after the second appellant had said "they had killed a dog" the second appellant started to run away but they caught up with him and later handed him over to the police. PW1 said he was present when the first appellant was arrested. He had a bush-knife on him tied with a piece of red rope around his neck.

This bush-knife, which was produced as an exhibit at the trial, was the subject of much evidence. In his testimony PW2, Musa Mavuso, said he was called to the scene where he saw the injured deceased lying. His injuries, he thought, had been inflicted by a bush-knife. A day later, he was on his way to the dipping tank when he saw the first appellant who, when he saw him, ran away from him. Later at the dipping tank he again saw the first appellant and called the latter to him and asked him why he had run off in a different direction. First appellant said he was going to see second appellant about the previous night's events and find out what had started the quarrel between second appellant and the deceased. Mavuso said he was not interested in the deceased's story but wanted to know from first appellant what had happened. As they were about to cross over a wire fence, a bush-knife (which was the one before the trial court) dropped out of first appellant's shirt. It had been hanging around his neck from a piece of red rope. He asked first appellant if it was the knife which he had used "to cut my brother." First appellant said it was not the

knife. He said he had just fetched the bush-knife he had with him from his uncle. Mavuso told first appellant that he wanted to hear the whole truth about the matter whereupon the latter said that it was not he who had inflicted the injuries on the deceased but the second appellant. Mavuso said he told first appellant that he was going to the police to lay a charge against him which he did. Mavuso said the relationship between the first appellant and the deceased was strained over the friendship of the deceased with first appellant's girlfriend. Mavuso said he was present when second appellant was apprehended by a number of men from the area. He was assaulted by these men who asked him why he had assaulted the deceased and in particular with the bush-knife. Second appellant said he had not done so. He had only used "a baton". It was first appellant who had been carrying a bush-knife. Mavuso denied that he had forced the bush-knife on the first appellant when he was apprehended.

The bush-knife was also the subject of the evidence of PW4, Mbizo Shongwe, who said that first appellant was his nephew. He testified that late at night on 7th December 1997, first appellant came to his house and knocked on the door. Asked by Shongwe who it was he said "it's me uncle, please open the door for me." First appellant's girlfriend was with him. Shongwe opened the door for them. First appellant then opened his jacket and took out a bush-knife. He said he wanted to leave it at Shongwe's house "because his wife did not want (him) to walk around with her at night whilst carrying a bush-knife." The knife was placed on top of the bed of Shongwe's wife. Early the following morning first appellant came to collect the knife and left with it in his possession. The bush-knife was the one before the trial court. Shongwe denied that there was bad blood between him and the first appellant over a woman, saying "he would not have even bothered to go to my place and place the bush-knife at my place if that was the case."

What I have set out so far was basically the Crown's case against the two appellants. First appellant's counsel applied for the discharge of his client at the close of the Crown case on the ground that there was insufficient evidence against him. This application was refused. Both appellants then testified.

First appellant's evidence was that he was nowhere near the scene at the time of the assault on the deceased. He was, he said, attending a customary wedding elsewhere on that evening. He had not set foot in the Mthombe area that day. The next morning he was assaulted near a dipping tank by a number of people who accused him of assaulting the deceased. Mavuso was lying when he said that he, first appellant, had run away when he first saw Mavuso. Mavuso was also lying when he said a bush-knife fell out of his shirt. PW1 had the bush-knife in his possession and showed it to him after the men had assaulted him. Mavuso further lied, he said, when he said that first appellant had told him that he had fetched the bush-knife from his uncle. Shongwe's evidence was also untrue that he had left the bush-knife at Shongwe's house. First appellant said he would not have done so "because we are not even related." All the Crown witnesses, he said, were lying. They had concocted the story against him at PW1 Magameni's instance because the latter had once stolen his chickens. Mavuso, who was Magameni's father, knew of this and had refused to allow him to lay a charge against Magameni about the theft of the chickens.

Second appellant said he was one of the people drinking beer at Magwence's house. After having a few beers he went home via the garden. When he got to the garden he found the deceased lying on the ground. He called to him but got no response. He thought the deceased was "too drunk" and as it looked as if it was going to rain he went back to the others to tell them about the deceased. They asked him to show them where the latter was lying and he took them to the spot. He heard the men commenting that the deceased was injured. He then saw PW1, who was among the men, picking up a knife that was lying next to the deceased. PW1 said "this is his knife", meaning it was the deceased's knife. Second appellant said he told the men that he wanted to go because he saw the rain coming and he was also not feeling well. He then went home. He denied that he had told those at Magwence's house that they had killed "a dog." Those who said he had done so were lying. PW2 told him, after his arrest, that first appellant had said that he, second appellant, had hacked the deceased. He told PW2 he did not know where first appellant was. He had not seen him for a long time. He denied that he told PW2 and the others who had arrested him that he had used a baton on the deceased. He also said that PW1 was lying when he said that he had seen second appellant hitting the deceased with a sjambok. He also said that the Crown witnesses were all lying.

At the conclusion of the evidence of the two appellants, counsel for the Crown requested the trial court to invoke the provisions of Section 199(1) of the **CRIMINAL PROCEDURE AND EVIDENCE ACT** and have Magwence, the owner of the house where the men had been drinking, called as a witness. The court acceded to the request. Magwence said he recalled the day that second appellant came and informed them that he had killed "a dog" by the river. They asked him to show them the "dog" he had killed. He took them to the spot where the deceased was lying. While they were tending to him, second appellant disappeared.

As stated above the only witness who testified to having seen the assault on the deceased is PW1. Before this Court both appellants submitted that the trial court had erred in relying on the evidence of PW1 who, they said, was untruthful. It is undoubted that PW1 was unreliable on one aspect of his evidence. In his evidence in chief he described where he was when he witnessed the assault. At an inspection in loco, however, it appeared clear that he could not have seen it from where he said he did, due to the distance from the scene and the fact that a hillock was in the way. PW1 then said that he had been standing at a different point when he saw the assault. Referring to this discrepancy the learned trial Judge said:

> ***"It would seem that PW1 was lying but in my view that variation does not affect his evidence materially. The court observed that he was very poor with distances and he appeared to me to be an uneducated and unsophisticated young man who only related what he saw. He appeared to me to be a credible witness in his simplicity and I have no reason to doubt his testimony at all."***

It is quite clear that because of the variation referred to, PW1's evidence must be viewed with caution. In my opinion, though, the trial court's finding that he was "lying" is too harsh a criticism. It is not uncommon for a witness to point out places at an inspection in loco that are not the same as those mentioned by him in the court

room before having the benefit of being able to show them to the court at the scene. His evidence must also be viewed in the context of all the other evidence. His evidence that second appellant, shortly after he (PW1) had seen the deceased being assaulted, said to those at Magwence's house that they had killed "a dog" is corroborated by Magwence. His testimony that first appellant had attacked the deceased with a bush-knife finds corroboration in the nature of the deceased's injuries and in the attempts by first appellant to dissociate himself from the bush-knife that PW1 saw in the first appellant's possession – one attached to a piece of red rope. The trial Judge referred to the evidence of both PW2, Musa Mavuso, and of first appellant's relative, Shongwe (PW4), which he accepted, that the bush-knife was in first appellant's possession. He rejected first appellant's denial – and, in my view, correctly so – that he had the bush-knife in his possession when the Crown witnesses said they saw him with it. The learned Judge saw the witnesses and believed them and this Court cannot find that he was wrong in doing so. Their evidence on the record reads convincingly. The evidence of Shongwe, the learned Judge said, was "damning". He said "the uncle has no reason to come to court and lie against his own nephew unless what he told the court took place. Accused says it did not take place. I do not believe him."

I agree with these remarks. First appellant's untruthful testimony in regard to the bush-knife lends credence to PW1's evidence that he saw first appellant using it in the assault on the deceased.

As for second appellant, apart from what he told the men at Magwence's house, he also told PW2, Musa Mavuso, that he had participated in the assault using a baton.

I can therefore find no reason for holding that the learned trial Judge erred in attributing the assault on the deceased to the two appellants. Nor can any fault be found with the finding of the trial court that both appellants "acting jointly with common purpose and unlawfully and with intent to kill assaulted the deceased. Even if their intention was not a direct one in the sense of ***dolus directus*** they must have known, by assaulting the deceased as violently as the injuries inflicted on him show they did, that death may result but they were clearly reckless as to whether it did or

not. At least their intention falls within the ambit of ***dolus eventualis.***

The trial court's finding that there were extenuating circumstances is also, in my view, a correct one.

As to sentence, this always lies within the discretion of the trial court and this Court will not interfere with it unless the trial court has misdirected itself or the sentence is one where there is a striking disparity between it and that which this Court considers appropriate. Neither of these factors apply to the present sentences. Both appellants participated in the assault on the deceased and no fault can be found with the trial court having treated them equally when sentencing them.

In the result the appeals of both appellants are dismissed. Their convictions and sentences are confirmed.

_____

P.H. TEBBUTT JA

_____

J. BROWDE JA

_____

J.H. STEYN JA

Delivered in open Court on this …… day of May 2000.