

IN THE COURT OF APPEAL OF SWAZILAND

CRIM. APPEAL CASE NO.27/2000

In the matter between:

MANDLA MAZIBUKO FIRST APPELLANT

PERCY GADLELA SECOND APPELLANT

MPHOSTOLI MAZIBUKO THIRD APPELLANT

MICHAEL NHLENGETHWA FOURTH APPELLANT

SIMO MAZIBUKO FIFTH APPELLANT

GCINA TSELA SIXTH APPELLANT

VS

REX RESPONDENT

CORAM : J. BROWDE, J.A.

: J.H. STEYN, J.A.

: C. E. L. BECK, J.A.

For the Appellants : E. TWALA

For the Crown : M. DLAMINI

JUDGMENT

BECK J.A.

The six appellants were charged with and convicted on two counts of murder. The two deceased men, Popi Mazibuko and Sisonono Mazibuko, were brothers and there had been a long-standing feud between their branch of the Mazibuko family and the neighbouring family of Frank Mazibuko, of which latter branch appellants 1, 3 and 5 are members.

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During the night of 28/29 September 1997 a large number of Frank Mazibuko's branch of the family, together with friends and acquaintances of theirs, were gathered at Frank Mazibuko's homestead where a cleansing ceremony was being held for Frank Mazibuko who had died about a month previously.

Below Frank Mazibuko's homestead there is a road and early in the morning of 29 September 1997 an approaching motor vehicle was seen on this road. It came from the direction of the nearby homestead of Popi Mazibuko and it was being driven by Popi Mazibuko with his brother

Siponono as passenger. A female voice from among the crowd at Frank Mazibuko's home was heard to shout "Here is the motor-vehicle we have been waiting for," and some young men were seen running down towards the road. One of these young men, by the name of Manqoba, blocked the road with the branch of a tree and stood in the road in front of the motorcar, causing it to stop. The others, who were appellants 2, 3, 4 and 6, stood to the side and back of the car. Popi and Siponono Mazibuko then alighted from the car, Popi with a bushknife and Siponono with a knobstick, whereupon Manqoba and appellants 2, 4 and 6, who were unarmed, all took flight. In the course of fleeing appellant 6 was wounded by a blow from Popi's bushknife and appellant 4, who came to his assistance, was felled and injured by a blow from Siponono's knobstick. Appellant 2 ran back to Frank Mazibuko's homestead unharmed, and there is no evidence that he took any further part in what occurred at the road. A group of people from Frank Mazibuko's homestead ran down to the road and attacked Popi and Siponono Mazibuko. Appellants 4 and 6 took no part in this attack because they were immediately removed from the scene by a member of Frank Mazibuko's family by the name of Dumisa Mazibuko, who is a Police officer. He transported appellants 4 and 6 to the Police station, where he reported that a fracas was in progress at the Frank Mazibuko homestead, and he then took them to the hospital for treatment of their injuries.

The group of people who attacked Popi and Siponono Mazibuko after they had alighted from the car inflicted upon them the most grievous multiple injuries which resulted in fatal cranio-cerebral damage.

Appellants 1, 3 and 5 were seen to take part in this murderous attack on Popi and Siponono Mazibuko.

Appellant 5 was seen to strike one of the deceased men on the head with a log of wood; appellant 3 was seen

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kicking the deceased as they lay on the ground; appellant 1 participated in the assault and was heard to say that the deceased had killed his father and must be left to die there. He returned to Frank Mazibuko's homestead after the attack on the two men came to an end and they lay inert on the ground, but he then heard a woman saying, "One of them is getting up." It was Popi Mazibuko who had stirred and had sat up. Appellant 1 took a bushknife, returned to where Popi was sitting, and struck him with it three times, after which he walked back to the homestead and was seen to lick the blood off the blade of his bushknife. Popi never stirred again.

This account of what occurred summarises the evidence of Crown witnesses whom the trial court found to be truthful and reliable. Counsel for the appellants has conceded, quite correctly in my view, that the conviction of appellants 1 and 5 is unassailable. Appellant 3 however, is in no better a position. The trial court's acceptance of the evidence that appellant 3 joined in the group assault on the deceased by kicking them as they lay on the ground at the mercy of their attackers is not open to criticism. The severity and the sustained nature of the group attack was obviously such that everybody who participated in it must have foreseen the possibility, indeed the probability, that it would have fatal consequences: *S v MALINGA* 1963 (1) S.A. 692 (A). A common purpose to bring about the deaths of Popi and Siponono Mazibuko was proved beyond any reasonable doubt against these three appellants.

The conviction of the other three appellants cannot be supported. The Crown's evidence against them amounted to nothing more than that they ran to the road, presumably to stop the car, but there is no justification for inferring beyond reasonable doubt that in so doing they had any intention that the occupants of the car were to be killed. They were all unarmed, and they merely stood and watched when Manqoba blocked the way by putting a branch across the road and by

standing in front of the car. When the occupants of the car alighted with weapons in their hands these three appellants at once took to their heels and played no part whatsoever in the fatal group attack that was thereafter launched on the two deceased men. The learned trial judge reasoned that it was only because they associated themselves with stopping the car that others were later enabled to kill its occupants. As he put it, "If the accused who successfully barred the motor-vehicle in which the two deceased were travelling

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had not done so, the accused who subsequently delivered the fatal blows on the deceased and brought about their death would not have succeeded in doing so."

That the car was successfully prevented from going any further ( a feat, incidentally, that was single-handedly achieved by the man Manqoba) is undoubtedly, as a matter of logic, a *causa sine qua non* as far as the later tragic events are concerned; but by itself that cannot serve to prove that appellants 2, 4 and 6 harboured a common purpose, with those who later assaulted the deceased, to commit murder. There was no evidence from which it can be inferred beyond a reasonable doubt that in running unarmed down to the road these three appellants did so in the expectation that the occupants of the car would be fatally assaulted, and with the intention of facilitating such an assault.

Indeed, it may even be that if Popi and Siponono Mazibuko had not themselves attacked and injured appellants 4 and 6 the confrontation that thereafter ensued might not have been so violent. I am in agreement with counsel for the appellants that the crown failed to prove that appellants 2, 4 and 6 are guilty of murder.

The sentences of 7 years imprisonment that were imposed on appellants 1, 3 and 5 on each count were ordered to run concurrently and were also backdated to the day of the arrest of the appellants on 29 September 1997. There was no misdirection on the part of the learned trial judge and the sentences are certainly not such in all the circumstances of the case as to cause any sense of shock.

If anything they err on the side of leniency.

Accordingly the appeals of appellants Mandla Mazibuko, Mphostoli Mazibuko and Simo Mazibuko are dismissed and their convictions and sentences are confirmed.

The appeals of appellants Percy Gadlela, Michael Nhlengethwa and Gcina Tsela are allowed and their convictions and sentences are all set aside.

C. E. L. BECK J.A.

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I agree

J. BROWDE J.A.

I agree

J.H. STEYN J.A.

Delivered in open Court on this. 148th .day of December 2000.