IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE Appeal Case No. 17/2002

In the matter between

SIPHO BONGANI MAVIMBELA & OTHERS Appellants

And

THE KING Respondent

Coram LEON, JP

TEBBUTT, JA

BECK, JA

For Appellant

For Respondent

JUDGMENT

LEON, JP

Five accused appeared in the High Court on a charge of murder. They were Simon George Mamba (accused No.1), Sipho Bongani Mavimbela, (accused No.2), Thembinkosi Bhekithemba Zwane (accused No.3), Thembinkosi Ntuli Mhlanga (accused No.4,) and Mfanimpela Masilela (accused No.5). It was alleged that on or about 10 September 1999 and at or near Ndunithini area in the district of Lubombo the accused, acting with common purpose and with intent to kill, assaulted the

deceased with stones and sticks causing him multiple injuries from which he died on the spot.

All the accused pleaded not guilty. The trial Court found accused No. 1 not guilty but accused nos 2, 3, 4 and 5 guilty and sentenced them as follows:-

Accused No. 2, 8 years imprisonment; accused no. 3, 8 years imprisonment; accused no. 4, 9 yrs imprisonment; accused no. 5, 8 years imprisonment. All the sentences were backdated to 11 September, 1999.

The appeal is brought only against the convictions. In the case of accused Nos. 2 and 4 it is claimed that the Court erred in finding that there was evidence linking them with the commission of the offence. In the case of accused No. 3 it is claimed that the Court erred in admitting a statement made by him before a magistrate (Exhibit B) and in the alternative rejecting that part of the third accused's statement that he was forced by the first accused to take part in the assault on the deceased as there was no evidence to gainsay that fact. It is alleged further that no common

purpose was proved.

In the case of accused No.5 it is said that no common purpose was proved against accused No.5 and that the trial Court erred further in rejecting accused No. 5's statement that he did not take part in any assault upon the deceased.

The post-mortem report was handed in by consent. It recorded that the cause of death was due to cranio-cerebral injury and penetrating injuries and the report sets out in detail the nature and extent of those injuries.

The investigating officer was Detective Sergeant Mkhabela. On 11 September 1999, at a time when he was stationed at the Lubuli Police Station, he and other police officers received a report of a murder. He went to the scene of the crime where he and other police officers found the body of the deceased, known as Paul Tsabedze who was known to him. The body was lying in some shrubs. He examined the body of the deceased. He noticed serious injuries on the head including the presence of brain tissues. He also observed that there were two stab wounds on the buttocks of

the deceased. Around the area he found blood-stained broken sticks and stones some of which had blood on them. He saw some signs of a struggle and formed the impression that more than two people had assaulted the deceased.

None of the accused gave evidence and the question which we have to consider is whether on the Crown case the guilt of the accused was proved beyond reasonable doubt.

It will be convenient to consider first the case against accused No.3 because the case against him depends upon the statement made by him (Exhibit B). As the admissibility of the statement was challenged the Court a quo held a trial within a trial at which the investigating officer PW7, the magistrate who took the statement, Ms Lindiwe Matse (PW8), and accused No.3 himself gave evidence. The contention that this statement was wrongly admitted was abandoned by counsel for accused No.3 at the hearing of the appeal.

That statement is, of course, admissible only against accused No.3 not against any of the other accused to whom it refers. In his statement accused No.3 said that he wanted to explain why he had assaulted the deceased. He saw accused No.2 and 4 and Eric running after the deceased after accused No.1 had handed accused No.4 a bush-knife. Accused No.3 did not wish to become involved but he was informed by accused No.1 that the deceased was a killer and a cattle thief. Accused No.1 then threatened accused No.3 and another with a bush-knife causing him to join the chase "because we feared he might harm us with a bush-knife". Accused No.3 then describes the assault upon the deceased in which he hit the deceased with a stone on the head and then hit him with a stone again on the stomach. One of the others assaulted the deceased by hitting him several times with a long stick. He also saw the deceased being hit with a large stone on the head and stabbed on the body, lower abdomen and thighs.

It is clear from his own statement that accused No. 3 took part in a murderous assault upon the deceased. The remaining question is whether his statement that he was threatened with a bush-knife by accused No. 1 assists him. It is urged that there is nothing to gainsay that statement but neither is there anything in the evidence to

support it. The first question to be considered is whether a defence of necessity or coercion can

operate as a defence to the killing of an innocent human being.

In R vs NKAMBULE 1982 - 1986 SLR 40 the High Court decided that a defence of duress or coercion shall not operate as a defence to the crime of murder but may only operate to the extent of reducing the punishment.

In reaching that conclusion the court relied inter alia on VOET 4.2.1 and MATTHEUS , the latter reference not being stated. It also referred to R. V WERNER & ANOTHER 1947(2) SA 828(A) AT 836 where the court referred to the English Law which is clearly to the effect that such a defence does not relieve the accused of criminal responsibility. The same view was taken in REX V MTETWA 1921 TPD 227.

In Werner's case (supra) WATERMEYER, CJ said this at page 837:-

"I shall not attempt to define the limits within which the plea of compulsion or necessity will excuse criminal conduct. It is enough to say that I am inclined to the view that the killing of an innocent person is not legally justifiable by compulsion or necessity, but even if it be legally justifiable, the fear of punishment or reprisal which existed in the minds of the accused in this case was not a justification. "

The weight of authority would appear to favour the view that the defence of coercion or necessity shall not operate as a defence to the crime of murder but can operate only to the extent of reducing the punishment.

However that may be, I am of the opinion that in any event the defence must fail. The accused raised the defence in his confession that he had been threatened by accused No. 1 and that that threat caused him to become involved in this offence but he did not give evidence and his bald statement of the threat could not be tested in cross-examination.

One does not know the full nature and extent of the threat, the precise effect which it had upon the accused and whether or not he was able to escape from the threat to himself.

It was urged on behalf of the accused that there was nothing to gainsay the statement of the accused. Nor, I might add, is there anything to support it, but in any event, as I have indicated, the bare untested assertion by the accused has no evidential value.

In REX VS MAHOMED 1938 AD 30 at page 34 the court quoted with approval the general principle stated by Stephen Digest of Criminal Law see 33 as follows:-

" An act which would otherwise be a crime may in some cases be excused if the person accused can show that it was done only in order to avoid consequences which could not otherwise be avoided and which if they had followed would have inflicted upon him and upon others whom he was bound to protect inevitable and irreparable evil and no more was done than was necessary for that purpose and the evil inflicted by it was not disproportionate to the evil avoided. "

And at page 36 of the majority judgment Watermeyer, AJA (as he then was) said:-

"Clearly exceptions from criminal liability based upon the broad principle stated by Stephen must be confined within the strictest and narrowest limits (emphasis added) because of the danger attendant upon allowing a plea of necessity to excuse criminal acts. "

It is clear from Mahomed's case that the onus lies upon the accused who raises the defence of necessity and that such a defence must be confined within the strictest and narrowest limits. It is clear that the bare assertion of the accused in this case cannot and does not discharge such onus.

It was contended in the alternative that the appellant should not be convicted of murder because he did not inflict the fatal injury or injuries but only struck the deceased with a stone. This argument must fail. Even if it is correct to hold that the

accused did not inflict the fatal injuries he clearly associated himself with those who did.

I am accordingly of the view that accused No. 3 was correctly convicted of murder.

Before I refer to the Crown evidence I should refer to the fact that both accused Nos. 4 and 5 made statements which were handed in by consent. Shortly stated, their statements are to the effect that they witnessed the lethal attack upon the deceased but took no part in it.

I turn now to consider the rest of the Crown case. Paul Mamba (PW2) had seen some of the accused meeting the deceased on the day before he met his death. His evidence takes the case no further.

Eric Dumisani Mamba was introduced as an accomplice witness by counsel for the Crown. However, during the course of his evidence it appeared to the prosecution that he had deviated from his previous statement allegedly made by him in which he had implicated the accused. He applied to have him declared a hostile witness. The application was opposed and refused. In the ruling the trial judge stated that he would only have regard to his evidence-in-chief. That evidence, briefly stated, is to the following effect.

The deceased was his uncle. On 10 September 1999 during the day he had been drinking with accused Nos. 2 and 5. A bus stopped. People alighted including his uncle who bought a cabbage. One of the boys with him said that his uncle was insolent and did bad things. He did not remember which one. They bought some liquor and drank it along the way. He was in the company of accused Nos. 2,3, 4 and 5 and others. They passed his paternal uncle Mamba's homestead. They spoke about the deceased being a wizard and troublesome. They spoke of other things as well. After covering about 400 metres they came across the deceased talking to Sipho Mamba. They continued walking and drinking and the witness then went to his girlfriend's house. He and his companions were all drunk. He was not cross-examined. His girlfriend also testified but takes the case no further.

Sub Inspector Albert Vilakati (PW6) testified that on 20 September 1999 accused Nos 3 and 4 came to the Lubombo Regional Headquarters where he recorded statements from them. He then took them to Sergeant A Mhombo who is a commissioner of oaths. His evidence takes the case no further.

The only other evidence involving the accused was that of PW7. When he arrested accused No 1 he found him in possession of a bush-knife. After he had arrested accused No 2 he cautioned him and the latter led him to the scene of the crime where a knife and some ash from a T-shirt were hidden. Accused Nos 1 and 2 did not make statements but accused Nos. 1 and 3 led him to the scene on 13 September. He also found accused No 1 in possession of a bush knife.

Accused Nos 2, 4 and 5 led him to the scene on the 21st September.

The trial court acquitted accused No 1 despite his having led the investigating officer to the scene of the crime and being in possession of a bush knife. The court also found that it was not proved what part accused No 1 played in the talk that the deceased was a wizard and troublesome. Nor in my view was the evidence any stronger against accused Nos 2, 4 and 5. The Court a quo said this:-

"The same cannot be said of accused Nos 2, 3, 4 and 5. Accused No. 2 clearly associated himself and participated when the group uttered threats and referred to deceased as a wizard and a menace in the area. "

He regarded the statements made by the accused as being corroborative of them taking part in the murder of the deceased. But those statements were exculpatory.

I have some difficulty with the trial judge's approach in this matter. Apart from the statement by accused No 3, the other statements are exculpatory of the accused who made them. They claimed to have witnessed the crime but not to have taken part in it. Their leading PW7 to the scene and the pointing out is consistent with those statements.

It must never be forgotten that in a criminal case the question is not whether the evidence is consistent with the guilt of an accused person but whether it is inconsistent with his possible innocence (of R v Nel 1937 CPD 327 at 330). In Net's case Davis J (as he then was) said this:-

"It cannot too often be repeated that in a criminal case the question is not whether the evidence is consistent with the prisoner's guilt but whether it is wholly inconsistent with his possible innocence. "

The guilt of accused Nos 2, 4 and 5 has not been proved and their convictions and sentences are set aside.

The appeal of accused No 3 is dismissed and his conviction and sentence are confirmed.

R.N. LEON, JP

I AGREE

P.H. TEBBUTT, JA

I AGREE

C.E.L. BECK, JA

DATED at Mbabane this..7th.....day of. June 2002