HELD AT MBABANE Appeal Case No. 11/2001

In the matter between

NHLANHLA CHARLES MORATELE 1st Appellant

PARTY MERVIN DLAMINI 2nd Appellant

And

REX Respondent

Coram LEON, JP

TEBBUTT, JA

BECK, JA

For Appellant

For Respondent

JUDGMENT

LEON, JP

The appellants were the first and second accused respectively in the High Court and they will be referred to in this judgment as accused Nos. 1 and 2 respectively.

The two accused appeared in the High Court on a charge of murder it being alleged that on 19 November 1998 and at or near Msunduza Location, Mbabane, the two

accused, acting in common purpose did unlawfully and intentionally kill Lucky Vilakati.

Despite their pleas of not guilty the accused were found guilty as charged; extenuating circumstances having been found, accused No. 1 was sentenced to nine years' imprisonment and accused No. 2 to seven years' imprisonment.

The appeal is brought both against the conviction as well as the sentence.

No medical evidence was led for the post-mortem report was handed in by consent. According to that report the cause of death was shock and haemorrhage following upon a stab wound of the lung. This wound was an incised wound to the left side of the chest. The pathologist found only one other injury, namely, a smaller incised wound over the outer aspect of the left upper arm in its upper third described in the report as "defence wound" which I take to mean a wound inflicted at a time when the deceased was defending himself.

There is no direct evidence as to who inflicted the fatal injury and the case against the accused depends upon circumstantial evidence. That being so, it was contended both in the Court below

and on appeal that in a case of circumstantial evidence regard must be had to what was held in the oft-quoted case of R v Blom 1939 AD 1SS namely that in reasoning by inference there are two cardinal rules of logic which cannot be ignored:

1. The inference sought to be drawn must be consistent with all the proved facts otherwise it cannot be drawn.

2. The proved facts must be such that they exclude every reasonable inference save that which is sought to be drawn.

And, as correctly pointed out by Mr. Sigwane on behalf of the accused, it is necessary for a Court, in dealing with circumstantial evidence, to consider the cumulative effect of the evidence and decide whether on the evidence as a whole the guilt of the accused has been proved beyond reasonable doubt.

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With that brief prelude I turn now to consider the evidence. In this regard the learned trial judge has given an extremely lengthy judgment in which all the facts are set out in great detail. I do not intend to repeat the exercise. It is not necessary to do so.

The dramatis personae in this case are: Mamakie Dlamini (PW1) who was the lover of the deceased; the deceased Lucky Vilakati; Lorraine Bhila, PW2 who is the sister of P.W1; Fikile Lukhele (PW3) who was the lover of accused No. 1; accused No, 1; accused No. 2, who is the son of PW3, but not the son of accused No. 1. The evidence reveals that he regarded accused No. 1 as his step father.

PW3 owned a motor vehicle, although there is some suggestion in the evidence that she owned the motor vehicle jointly with accused No. 1.

On the fateful day it seems to be common cause that PW1, PW2, PW3 and the two accused had all, had a fair amount to drink. Indeed PW3 declined to drive her car when it was required for a mission because she had had too much to drink. This caused the deceased to offer his services but he did not have the keys of the car which were in the possession of accused No. 1. Not deterred he managed to start the car without a key and the car drove off on the mission. The Crown evidence was that accused No. 1 had refused to part with the keys. The party comprising the deceased, PW3 and one Mhlume then drove off ultimately arriving at Gobholo. The three of them entered a bedroom and drank some beers. According to the evidence of PW3 while they were drinking beers accused No. 1 stormed in shouting at the deceased for starting the vehicle without keys. This caused PW3 to move away and it was the last time that she saw the deceased alive. Later PW3 was slapped by accused No. 1 when he found her.

The evidence on this part of the case by accused No, 1 is similar although not precisely the same. He arrived at Gobholo to find the deceased and PW3 (his girlfriend) sitting on a bed in the bedroom and drinking. This drinking annoyed him for he asked why they were drinking in the bedroom and not the sitting room. He also raised the question as to how they had managed to drive the motor vehicle without

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keys. He confirmed that PW3 had run away and that it was much later when he found her and slapped her.

The background evidence, to which I have briefly alluded, shows that accused No. 1 was angry with the deceased for having driven the car without keys and also for being in the bedroom with his girlfriend PW3.

PW1 takes up the story from there. After meeting friends she returned to her house later that evening to find that the deceased was lying in bed. Shortly after that accused No. 1, in the company of accused No. 2, pushed the door open asking for the deceased. They went straight to the bedroom. Accused No. 1 asked the deceased why he had started the motor vehicle: without him while accused No. 2 asked "What do you want from my mother?" PW1 asked them not to make a noise which caused accused No. 1 to slap her with an open hand. Both the accused made feinting gestures towards the deceased, accused No. 1 with a bottle and accused No. 2 with his fist. This alarmed PW1 who told her sister PW2 that she was going to call the police. She asked a neighbour to do so. After that she returned to her house but did not enter it as it was in darkness. She did enter it when the police arrived. On arrival the police lit a torch and found the deceased lying behind the door. They shook him but he did not respond. They took the deceased to the hospital but on arrival there he was pronounced dead. In her sitting room she found a bloodstained knife (Exhibit 1) and a bloodstained skipper (Exhibit 2) which, it is common cause, was won by accused No. 2.

As to the earlier events PW2 confirms the evidence of her sister. They returned home together after visiting friends. Her room is adjacent to her sister's house. She heard a noise coming from her sister's house; it sounded like a fight. She entered the bedroom and found the deceased lying in bed reading a book. Accused No. 1 and accused No.2 were there. She heard accused No. 1 say that he found the deceased in bed with PW3 at Gobholo and he also stated that the deceased had started the motor vehicle without a key. Accused No. 1 made feinting gestures at the deceased with a beer bottle while both the accused punched him but she admitted in cross examination that she did not sec any blows land. The deceased was unarmed. PW2 confronted accused No. 1 who slapped her causing her to fall down

PW1 then informed PW2 that she was going to call the police and left. After that accused No. 2 took off his shirt saying to the deceased, "What do you want with my mother?" After that the light went out and she heard a commotion; she heard the noise of a breaking bottle. Accused Nos. 1 and 2 came running out of the house. PW2 then went to look for the deceased. Although her evidence in chief on what happened then was inaudible it appears both from the cross-examination and the re-examination that in the dark she stepped upon the hand of the deceased at the entrance to the bedroom but the deceased did not move. It seems to me to be highly likely that, at that stage, the deceased was either dead or unconscious and that the fatal wound must have been inflicted which caused the deceased, who had been lying in bed, to land on the floor. I mention this because there was evidence from PW2 that after she had stepped on the hand of the deceased some unknown boys rushed into the house looking for the deceased but ran away when the police arrived. There was some suggestion that the deceased may have been killed by these unknown boys on the evidence of PW2. I do not consider such a possibility to be a reasonable one.

The evidence of the accused was different. Accused No. 1 admitted being annoyed to discover the deceased drinking in the bedroom with his girlfriend PW3. He further admitted slapping PW3 when he eventually found her.

He had earlier gone to PW1's house to look for PW3. However, his version of what happened thereafter differed sharply from that of PW1 and PW2. He stated that a fight took place between PW1 and the deceased after the former accused the latter of sleeping with PW3. Accused No. 2 tried to separate them. The deceased grabbed accused No. 2 by his shirt, he heard the sound of a breaking bottle and accused No. 2 came out naked above the waist and covered in blood. He

saw that accused No. 2 had a cut above the eye and they then left the house of PW1. He agreed that the light had gone out but that was when PW1 and the deceased were fighting.

The evidence of accused No. 2 was substantially the same as that of accused No. 1. He denied the Crown evidence that he had ever threatened the deceased saying that he wanted to teach him a lesson. In particular he confirmed the evidence that the fight

by the deceased the injury causing substantial bleeding. According to him his wound was stitched at the hospital. He also claimed to have been throttled by the deceased. A number of aspects of his evidence and that of accused No. 1 were not put in cross-examination. Both the accused admitted being on good terms with PW1 and PW2.

The trial judge was impressed with the evidence of PW1 and PW2, not with PW3 nor the accused. With regard to PW1 and PW2 I do not consider there to be any adequate grounds to disagree with that conclusion. With regard to PW3, her evidence is not of much importance and on her own evidence she was clearly very drunk. I also consider that the Court a quo was correct in rejecting the evidence of the accused. If their story was true why should PW1 rush off to call the police? Moreover they agreed that they were on good terms with PW1 and PW2. A number of aspects of their evidence, as I have already noted, was not put in cross-examination.

I am unpersuaded that the trial court erred in accepting the evidence of the Crown witness and rejected that of the accused where it conflicted with the Crown case.

However the above conclusion does not dispose of the matter because the Crown faces a real difficulty. It may safely be inferred that the deceased was killed by one of the accused. But which one? Although the shirt of accused No. 2 was bloodstained that does not necessarily prove that it was he who killed the deceased. The blood may have come from a wound above his eye. The killing took place in the dark and there are no eye witnesses as to who inflicted the fatal injury. All that one can conclude is that one of the accused did so. This difficulty would have been overcome if the Crown had been able to prove that the accused who did not kill the deceased had a common purpose with the one who did. Here, too, the Crown must fail. There is no evidence that either of the accused was seen in possession of a knife and on the evidence the knife was probably produced for the first time in the dark after the light had gone out. There is no evidence that the accused who did not have the knife saw it before it was produced by the killer. Common purpose has not been established.

Mr. Ngarua who appeared for the Crown initially contended that common purpose had been proved but later conceded that he was unable to overcome the difficulties in

the way of the Crown and agreed that the accused should only have been convicted of common assault..

I agree. I should add that there is no proof that any of the "feinting" blows landed.

The accused have been in. custody for 3½ years. I consider that the justice of the case will be met if the sentence is altered in each case to one of 3½ years imprisonment backdated to the date of the arrest of the accused on 19th December, 1998.

In my judgment the appeal must be allowed and the conviction of murder set aside. It is ordered

that the accused are both convicted of common assault. The sentences are set aside and are substituted in each case by a sentence of 3½ years imprisonment which is backdated to 19th December, 1998.

LEON, JP

I AGREE

TEBBUTT,JA

I AGREE

BECK, JA

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