

IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE APPEAL CASE NO. 11/2002

In the matter between

SIBUSISO SHONGWE 1st Appellant

MILTON MAMBA 2nd Appellant

ROBERT SHONGWE 3rd Appellant

VUSI SHONGWE 4th Appellant

EPHRAIM MAMBA 5th Appellant

NTOMBIFUTHI SHONGWE 6th Appellant

vs

REX

Coram LEON, JP

STEYN, JA

TEBBUTT, JA

For Appellants 1, 4, 5 and 6 - Adv. E.V. Twala

2 and 3 - Adv. M. Mamba

For the Crown Mrs. S. Wamala

JUDGMENT

LEON, JP

The appellants were accused Nos 1,2,3,5,7 and 8 in the Court a quo and will hereinafter be referred to as the accused. They appeared with eleven other accused on two counts of murder. Two of those accused were

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acquitted at the close of the Crown case while the others were acquitted at the end of the whole case.

The murders of which the six accused were convicted were the murderous killings of Mandlenkhosi Shongwe and his wife Busisiwe Shongwe on 16 March 1997 and at or near Mashobeni in the district of Hhohho. It was alleged in the indictment that all the accused were acting jointly or with common purpose.

Those accused who were acquitted were acquitted on the basis that, although they were present at the scene of the murders, they took no part in them but were merely spectators.

The six accused presently before this Court all pleaded not guilty to the charge. After they had been convicted the Court heard argument on the question of extenuating circumstances holding that they were present in the case of the murder of the husband but absent in the case of the murder of his wife. In the case of the murder of the husband each of the accused was sentenced to life imprisonment while in the case of the murder of the wife they were sentenced to death.

The background to this case is that the first deceased was the priest of a church known as the Sibetsamoya Church in Zion from which, some time before the murders, the accused persons together with most of those who were acquitted, had defected joining a new church known as the New Heaven Church in Zion. The first deceased was believed to have been responsible for the death of a relative of one of the accused, who died in a motor car accident. It was believed that he had supernatural powers and that he also prepared some kind of medicine at his home where his church

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was and that that medicine harmed people. In short he was believed to have been a wizard. This is common cause.

Before I refer to the evidence implicating the accused it is necessary to refer to the fact that these were brutal and savage murders.

Dr. R.M. Reddy, a pathologist, performed a post-mortem examination on the bodies of the two deceased persons on 21 March 1997. In the case of Mandlenkhosi Shongwe and that of his wife the cause of death in each case was haemorrhage caused by multiple chop wounds. He found the following injuries in the case of the first deceased:

"1. Chop wound over forehead centre to parietal region 11 x 2 cm bone deep and right forehead to tempora parietal region 21 x 1.9 cm bone deep with intra cranial haemorrhage.

2. Chop wound over back of neck 16 x 4.7 cm cervical vertebrae deep.

3. Chop wounds over left parietal region 6 x 1 cm, 4.7 x 1.2 vault deep.

4. Chop wound over left cheek 15 x 3.4 cm, right cheek 9 x 3.7 cm facial bone deep.

5. Chop wound over left ear 7.2 cm x 1.1 cm bone deep.

6. Chop wound lower region neck right 9 x 4.2 cm, 7 x 4 cm muscle deep

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7. Chop wound over right shoulder 14 x 3.9 cm bone deep

8. Chop wound over right forearm 21 x 6.2 cm muscle deep

9. Chop wound over left elbow 4 x 2.1 cm bone deep

10. Chop wound over left forearm 13 x 4.2 cm muscle deep. All margins of the wounds are with abrasions and contusion." In the case of the wife he noted the following injuries:

"1. Chop wounds over back of neck 5 x 3cm, 6.2 x 4 cm and 4.3 x 3 cm bone deep involving muscles, vertebrae and spinal cord at 2-4.

2. Chop wound over occipital region 5 x 2 cm vault deep. Behind right ear, over right parietal region 4 x 2 cm and 5 x 1.7 cm vault deep with a subarachnoid haemorrhage all over brain.

3. Chop wound over right cheek 13 x 2.7 cm bone deep involving muscles, facial bones, nerves, vessels.

4. Chop wound over right supra clavicular area 7.1 x 3 cm muscle deep and right shoulder 6 x 2.4 cm, 7 x 5.2 cm muscle deep.

5. Chop wounds over right forearm lower third 6 x 2.7 cm and 5.9 x 2.3 cm bone deep and over dorsum of hand 9 x 2.1 cm, 6 x 2.1 cm bone deep involving vessels.

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6. Abrasions over left shoulder 3 x 2.3 cm.

7. Chop wound over left forearm lower third 9 x 4.7 cm exposing cut bones, vessels, nerves, muscles.

All margins of wounds are with abrasions and contusions."

In the opinion of Dr. Reddy all the injuries except the sixth injury on the female deceased (which was caused by sticks or batons) were caused by sharp instruments such as axes or knives.

The main evidence implicating the accused persons was that of the deceased's son Nhlanhla Shongwe (PW1) and his sister Thulisile Shongwe (PW3). On the fateful day the family were preparing maize for storage when the dogs began to bark. Shortly after this, according to PW1, accused Nos 1, 2 and 3 approached them wearing heavy overcoats. At that stage the family was seated on the ground. Accused No. 2 asked PW1 's father whether he was thinking of them. The father invited them to sit down whereupon they all took out bush-knives and started hacking his father with them. His mother ran away but came back. His mother was then assaulted by accused No. 8 who hacked her with a home-made axe on the forehead. Accused No. 5 joined in the attack by assaulting his mother all over her body with a baton. The group then burnt down the deceased's house saying that it was full of witches and wizards. He also saw accused No. 7 there who was busy waving a baton around in the air next to his mother. At that stage PW1 rushed off to report the assault to his grandfather. Just before he left, the group was still attacking his father, finishing him off. After realising that he was still alive they continued to hack him.

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Certain weapons were produced by PW1. He identified a knife used by accused No. 3, a knife carried by accused No. 8, an axe carried by accused No. 2, an axe carried by accused No. 7 and another axe carried by accused No. 1.

At page 26 of the record the following occurs:

"DEF COUNSEL He said in chief that they burnt a hut at that homestead. JUDGE Yes and that is

where they said the witches and wizards are."

I shall return later to the significance of this passage.

In the course of cross-examination PW1 stated that his father was a prophet who used herbs to cure people. With regard to what happened after the event PW1 said this at page 38 of the record:

"What happened was that after this gang were through with what happened, they were going away singing, they were heard saying that they had destroyed the house where all (my emphasis) the witches and wizards were contained. "

He elaborated on this at page 48 of the record thus:

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"What they said was Mandlenkhosi of Mashobeni area is dead and so is his wife (my emphasis) now they were going to live a trouble free life."

With regard to the position of accused No. 7, PW1 had initially stated that he saw accused No. 7 waving a baton around near his mother. Later he identified an axe as having been carried by accused No. 7. He explained this by saying that accused No. 7 obtained possession of the axe later. He described the weapon carried by accused No. 8 as being a panga not a bush knife. He saw accused No. 8 kicking his father and his mother and she also poked at her mother with the machete which she was carrying. The group also assisted by blocking the way thus preventing his parents from escaping.

PW1's sister Thulisile Shongwe testified as PW3. She mentioned that accused Nos 1,3 and 8 were her grandfather's sons and daughter respectively. Her evidence was substantially in accordance with that of her brother as to how the incident began. It was accused No 2 who asked her father what he was doing to them. Her father responded by asking them to sit down and talk but it is then that accused No 3 produced a bush knife from his coat and began hacking her father with it. Her father started running but they ran after him, hacking him. Her father fell down and when accused No. 3 reached him he said that "the dog was not yet dead" and hacked him again with a bush-knife on the back of his neck.

They then began to look for her mother who had entered one of the huts. They broke down the door and took her out. She began running but as she was running they hacked her all over her body. She saw accused Nos

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1, 3, 5, 7 and 8 take part in the hacking of her mother but she did not notice accused No 2 at that stage.

Her mother fell down and while she was lying on the ground facing upwards accused No 8 hacked her on the forehead with a bush-knife. They then set the house on fire.

With regard to the weapons carried by the accused, PW3 alleged that accused No 1 was carrying an axe, accused No 2 an axe, accused No 5 a short bush knife, accused No 7 a home made axe and accused No 8 a bush knife.

At the time when the deceased were killed Sicelo Ngane Dlamini (PW 4) testified that he was

present at their home. He had gone there to attend a church service.

He saw accused Nos 1, 2 and 3 arrive. They were all seated on the ground. The three accused started hacking the two deceased which made the witness decide to run away. When he began to run away he met accused Nos 5, 7 and 8 in the yard of the homestead of the deceased. He ran away to his home.

There was further Crown evidence to which it is not necessary to refer in any detail, that, after the killing of the two deceased, the accused and the other accused who were acquitted met at a sports field. Thereafter they went to a police station where they handed in various weapons including bush knives, axes and batons.

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Before I refer to the evidence of the accused there is one matter which requires some clarification. In the original indictment the accused were charged on one count of murder, the victims alleged being the two deceased. However, both in the judgment of the Court a quo and in the heads of argument reference is made to two counts, namely, Count 1 being the alleged murder of Mandlenkhosi Shongwe while Count 2 alleges the murder of his wife Busisiwe Shongwe. It would seem that either the original indictment was amended or that the Crown, the defence and the Court agreed that the case would be treated as one of two counts of murder.

In the event the Court convicted the accused on both counts of murder finding that extenuating circumstances were present on Count 1 but not on Count 2. Hence on the latter count the sentence of death was imposed while on the first count a sentence of life imprisonment was imposed.

I turn now to give a very brief account of the defence case.

Accused No 1 admitted going to the deceased's homestead that day but testified that he went there alone. He was only carrying a knobstick and this was for his own protection. When he arrived at the homestead he found that accused 2 and 3 were already there. PW1 tried to attack him with an axe but he warded off the blow with his knobstick. He ran towards some trees but, looking back, he saw accused Nos 2 and 3 engaged in a fight with the deceased on Count 1. He gave detailed evidence as to why he regarded the deceased on Count 1 as being a wizard and as being responsible for the death of one Phindile, a member of his church, who had died in a motor car accident.

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Accused No 2 also denied taking part in any attack upon either of the deceased although he admitted that he had gone to the deceased's homestead on the day in question. He had gone there in order that some mediation would take place between himself and the priest (deceased is also referred to as "the priest") which would be conducted by a third party with regard to a dispute between them. The dispute had a background of witchcraft. However the deceased on Count 1 threw mealie cobs at him and he left.

The evidence of accused No 3 was substantially similar to that of accused No 2.

Accused No 5 also claimed to have been bewitched by the deceased on Count 1. On the day in question he ran to the scene in consequence of hearing an alarm. There he saw PW3 Thulie crying and then he spotted the body of Mandlenkhosi (the deceased on Count 1) lying in a pool of blood. He then left the scene.

Accused No 7 also denied having taken part in an assault upon either of the deceased. He saw some smoke coming from the Shongwe household. He went to the gate and saw PW1 running out from the homestead. Many people were at the homestead. While at the gate he saw the deceased on Count 1 lying in a pool of blood. He was afraid to enter the homestead and went home. He found that the occupants of his house had gone to the police station and he followed suit.

Accused No 8 is the wife of accused No 2. She also testified in her defence. She denied having taken part in any assault upon the deceased persons. She had formerly been a member of Mandlenkhosi's church but

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she had defected to the New Heaven Church in Zion because her husband had been bewitched by the priest. She had also been abducted.

She admitted going to the deceased's homestead on 16 March 1997 where she saw PW3 crying. She was with her brother. They came across the priest's wife lying on the ground. She then saw people running into the maize fields. She and her brother decided to leave the scene and they left.

The trial Court concluded upon cogent grounds that the evidence of the Crown eyewitnesses fell to be accepted and that of the accused rejected. In my judgment there is no justification for disagreement in any way with that conclusion and I do not understand counsel for the accused to do so.

In the course of his careful judgment the learned trial judge set out at some length the law of common purpose. With regard to the position where accused persons are members of a crowd, the Court referred to *S. v KHUMALO EN ANDERE* 1991(4) SA 310(A) and to the headnote at page 315 where the following appears:-

".....where the crowd's intention was spoken of.....what was meant was the intention of every member of the crowd. If intention was to be inferred from the state of mind of a large group of people such inference would only be justified where the Court had no reasonable doubt that all the members of the group had such a unanimous intention and that accused was a member of such group in the sense that he shared such intention. "

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With that may be contrasted the position of a member of a crowd who is merely a spectator.

The Court found, correctly in my view, that on the Crown Case accused Nos 1, 2, 3, 5, 7 and 8 ran after both the deceased. The Court found further that each of those accused had the intention to kill thus satisfying the requirements of Khumalo's case (supra). I agree. It was contended by Mr. Mamba on behalf of accused No 2 that he was not seen assaulting the deceased on Count 2. But he had played an active part in the attack on her husband and he was part of the group seen by PW1 chasing the deceased on Count 2. Moreover an intention to kill her may be inferred from the following:-

1. The evidence shows that the killing of the two deceased was in reality one transaction. Having delivered the mortal blows on the first deceased, the group including accused No 2 immediately ran after the second deceased plainly with the intention of killing her. The correctness of this

conclusion was conceded by Mr. Mamba in his argument before us.

2. The singing after the event that, having killed the two deceased, they could now live trouble-free lives is further proof of an intention to kill both of them and very likely in consequence of an agreed plan to do so. The law is quite clear: where two or more persons associate in an unlawful enterprise each will be responsible for the acts of his fellow conspirators if it falls within their common design or object provided that the necessary mens rea is present. (see e.g. *Safatsa v S* 1988(1) SA 868(A)).

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In support of his conclusions the learned judge a quo stated:

"As for accused No 1, 2, 3, 5, 7 and 8 I have no hesitation at all that they committed this offence. In view of the circumstances of the case I find that the requirements in *S v Khumalo en Andere* 1991(4) SA 310 are satisfied. In criminal law a crowd cannot have intent and, if it is attempted to infer intent that inference can only be justified where the court has no reasonable doubt that the members of the crowd had such unanimous intent and that the accused was a member of the group in the sense that he shared such intent. In the case in casu one cannot escape the irresistible conclusion that these people had the intention to kill the two people. One does not hack people the way they did to the deceased persons if one is not intending to kill".

At the hearing of the appeal Mr. Twala appeared on behalf of accused Nos 1, 5, 7 and 8. In his heads of argument Mr. Twala raised a number of points. They include:-

1. the submission that the evidence against accused Nos 5, 7, and 8 did not establish that they participated in the killing of the two deceased or that they had a common purpose with those who were proved to have killed them.
2. A submission that, because the eyes of the accused were red as if they had taken something it followed that a defence of intoxication should succeed. Such a defence was never raised

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nor investigated. Indeed the accused, when they gave evidence, had a clear recollection of what they allegedly did and said. 3. A submission that the accused were provoked by sudden witchcraft, but such submission was at odds with all the evidence. I have already dealt with the evidence against accused Nos 5, 7 and 8.

I have no doubt that Mr. Twala's clients were all correctly convicted. When the court put its difficulties to Mr. Twala he abandoned his argument on the merits and limited it to the question of extenuating circumstances.

Mr. Mamba sought to amend his grounds of appeal by adding a further ground namely that the indictment was null and void as it reflected the name of the King and not the Director of Public Prosecutions. This argument has no merit. The body of the indictment makes it clear that it is the Director who is prosecuting and he does that in the name of the King who appears in the heading. Moreover this point was not taken at the trial and is raised for the first time on appeal. The accused by not excepting to that indictment at the trial may be taken to have acquiesced in it. In any event the point is without merit and the court refused Mr. Mamba's application.

I am satisfied on all the evidence that accused nos 1, 2, 3, 5, 7, and 8 were all correctly convicted.

I turn now to deal with the question of extenuating circumstances. In holding that there were no extenuating circumstances on Count 2 the learned Judge regarded the deceased on that count as an innocent

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victim. The wizard was the first deceased. It was he who had caused trouble to the accused not the deceased on Count 2. In his judgment the trial judge had referred to evidence that the two deceased were witches. However, in his judgment on extenuating circumstances, he said that he had made a mistake and that, on playing back the tapes, the evidence referred to "witch" in the singular.

Naturally I accept what the learned judge heard. However that does not explain what appears at page 13 of the record namely: "the house was full of (my emphasis) witches and wizards." Not does it account for the further evidence of PW1 at page 38 of the record that he heard them singing after the killings that they had "destroyed the house where all (my emphasis) the witches and wizards were contained." And when PW1 was asked in cross-examination (at page 48 of the record) about the burnt house he said:

"What they said was Mandlenkhosi of Mashobeni area is dead and so is his wife (my emphasis), now they were going to live a trouble free life."

I am aware of the fact that I have referred to these extracts earlier herein. I do so again to emphasise the point that the evidence clearly shows that, although it was the deceased on Count 1 who had bewitched them, they regarded his wife as also being infested by witchcraft. Moreover there is further evidence that the accused regarded the deceased on Count 2 as being part of the problem. When she went to offer her condolences to the relatives of Phindile Mamba she was chased away. At that time she was told that the people (my emphasis) who had caused her death were known

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and that accused No. 3 would bring axes and come with his own people to the homestead for those people that have killed Phindile."

I also disagree with the learned Judge when he held that the killing of the deceased on Count 2 was a separate transaction. It appears from the evidence that, as soon as they had delivered the mortal blows on the first deceased, the group went in search of the second deceased and when she was found she was hacked to death.

In my view the Court a quo, having found extenuating circumstances on Count 1, should also have made a similar finding on Count 2.

In my judgment the appeal against the finding on Count 2 that there were no extenuating circumstances must succeed and the sentence of death must be set aside.

This was a most brutal and savage killing which deserves a very severe sentence. In my view a sentence of 18 years on count 2 would be appropriate.

Finally I turn to the appeal against the sentence of life imprisonment on Count 1. It is contended that the sentence induces a sense of shock. Reliance is placed on the accused's belief in witchcraft and that as this is a case of recklessness (dolus eventualis) and not dolus directus a lesser sentence ought to have been imposed. Counsel for the crown stated that in her experience

a sentence of between 10 and 15 years was usually imposed by the High Court in the Kingdom in witchcraft cases. This is in accordance with my own recollection.

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Finally I should add that although the court should always endeavour, if it is possible, to individualise sentences so that they fit the criminal as well as the crime there is not sufficient evidential material before is to justify such a course being followed in this case. These were particularly brutal and savage murders and that is why a sentence of 18 years is appropriate for count 1 as well. That sentence differs sufficiently from that imposed by the trial court as to justify interference by this court.

In the result the following order is made:-

1. The appeals of accused Nos 1, 2, 3, 5, 7 and 8 against their convictions are dismissed and the convictions are confirmed.
2. The appeal against sentence on count 1 is allowed and the sentence on that count altered to 18 years' imprisonment.
3. The appeal against the finding on count 2 that there were no extenuating circumstances succeeds and the judgment of the court a quo is altered accordingly. The sentence of death on that count will be set aside and is replaced by a sentence of 18 years' imprisonment.
4. The sentences on counts 1 and 2 are ordered to run concurrently and are backdated to 16 March 1997.

LEON, JP

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I AGREE

STEYN, JA

I AGREE

TEBBUTT, JA

DATED AT MBABANE this.....15th day of November, 2002