IN THE SUPREME COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE Criminal Appeal No. 02/07

In the matter between

THOKOZANI VILAKATI Appellant

and

THE KING Respondent

Coram

BROWDE AJP

TEBBUTT JA

BANDA JA

For Appellant	In Person
For the Crown	Mr. N.M. Maseko

JUDGMENT

TEBBUTTJA

[1] Almost eleven years ago, shortly before 6 a.m. on 1 July 1997 Elijah Gobobo Vilakati was stabbed to death in his bedroom. A post-mortem examination showed that he had ten stab wounds, of which two were fatal. The Crown alleged that it was the Appellant who had stabbed the deceased, who was his father. He was arrested and taken into custody and on 11 February 1998 was served with an indictment charging him with murdering the deceased.

[2] The further history of this matter is that the Appellant at the instance of the late Dunn J, was examined and assessed at the Swaziland National Psychiatric Centre on 9 July 1998 and on 21 October 1998. In a report dated 26 October 1998, Dr. R. Ndlangamandla, a Consultant Psychiatrist at the Centre said that the Appellant was "a known psychiatric patient who has had several admissions into the mental hospital since 1994. With all his admissions he presented with history of aggression and violence, destructive behaviour, isolating himself and feeling persecuted by family members."

His admissions were also associated with a history of cannabis abuse.

[3] The report goes on thus:

"*Presently he is fully alert, gives a fair account of himself and he admits committing the crime he is charged with. He says he killed his father because he was always against his plans, which include taking over the National Airways and Lubombo Ranches.*"

[4] The Appellant, so the report continues, said he had been feeling unsafe ever since he disclosed his plans to people, as he felt they may try to harm him. Even while he was in custody he felt unsafe. He had always believed that his family were bewitching him, including his mother and father.

[5] According to his mother, said Dr. Ndlangamandla, since the onset of the Appellant's illness, he would lock himself in his room most of the time. He would not talk to members of his family, especially his father whom he had not communicated with for almost three years.

[6] The rest of Dr. Ndlangamandla's report is important and I cite it in full:

"*On the day of committing the crime he is charged with he went into his father's bedroom, found him lying on the bed and started stabbing him with no apparent provocation. He says he killed his father because of all the things he had done against him, bewitching him, sabotaging his business plans and being against him buying a car. All this was part of his delusional system.*

On mental status evaluation, he is fully alert and orientated in all spheres. He lacks insight into his illness and is thought disordered as shown by his speech being circumstantial and tangential. He has delusions of persecution which has been going on since the onset of his illness in 1994. It seems his whole life has been controlled by these delusions which are associated with paranoia. He also experiences auditory hallucinations. His mental illness has been complicated by cannabis abuse.

When he committed the crime, he acted on his delusional beliefs as he falsely believed that his father was responsible for his failures.

He cannot be held criminally responsible for his actions as he laboured under delusions when he committed the offence. He most likely suffers from Schizophrenia, complicated by cannabis abuse."

[7] The Appellant was examined again in August 2002 by Dr. J. Hilary Dennis, a Consultant Psychiatrist in private practice, who on 28 October 2002, reported that, and I quote:

> "*The mental status exam revealed circumstantial and tangential thought process. There was evidence of paranoid delusion. He denied auditory and visual perception delusion. He was oriented to time, person and place. There was some impairment in his insight*

and judgment regarding his illness. The psychiatric examination revealed a psychotic disorder."

[8] In 2003 Dr. Dennis again examined the Appellant at the request of Maphalala J to determine whether his condition was curable or permanent and to comment on treatment issues and indicate whether the Appellant was fit to stand trial. Dr. Dennis, on 16 October 2003, reported that the Appellant's history and the mental status exams (sic) indicated a psychotic disorder. It was likely that his condition was permanent. Dr. Dennis said that the issue of competence to stand trial was "complex, not static and may be legally or mentally determined."

The Appellant should have treatment for at least two months and then be re-examined with a view to determining his competence or fitness to stand trial.

[9] In January 2004 this was done by Dr. Ndlangamandla who reported that the Appellant showed "good contact" and "gives a coherent account of himself. His report proceeds as follows:-

"He *shows no features of any mental illness. On mental status evaluation he is psychotic and euthymic. He is fit to stand trial*"

[10] The trial of the Appellant then eventually started before Annandale ACJ in the High Court in May 2005. The Appellant

pleaded not guilty to the charge against him. He was defended by a senior Swaziland Legal Practitioner, Mr. Ben Simelane.

[11] The Crown led four witnesses: Thulani Vilakati, the Appellant's stepbrother as PW1; the Appellant's grandmother and mother of the deceased as PW2; an investigating police officer, Detective Myeni; and the Pathologist who conducted the post-mortem examination of the deceased.

PW1 testified that in July 1997 he lived in the same house as the deceased and the Appellant. On 1 July 1997 his father, the deceased, woke him and asked him to check the oil and water in his motor vehicle. While he was doing so the deceased called his name. He opened the latter's bedroom door and "saw the accused Thokozani stab my father on the back." He ran out and reported the incident to his grandmother. He then called his elder brothers but by this time the deceased was already dead in his bedroom. The deceased was at all material times alone in his bedroom.

PW1 was subject to a detailed and searching cross-examination by Mr. Simelane. He was adamant that he saw the Appellant stab the deceased. The Appellant had bloodstains on his clothes. It was put to him that the movement he saw was not a stabbing one but that the Appellant was trying to remove a knife from the back of the deceased and that the blood he saw on the Appellant was as a result of the Appellant trying to help the deceased. PW1

denied both of these propositions. In reply to the Court PW1 said there was no possibility of another person having stabbed the deceased and getting away before he got to the bedroom. He had rushed in as soon as he heard his father call and had met no one.

[14] A question arose during PWl's evidence as to whether PW1 would have had a clear line of sight from the motor vehicle to the deceased's bedroom window and an inspection in loco was then held by the trial Court. The Court later made a positive finding that it was abundantly clear that if PW1 was where he said he was, he could well have been in a position to see what he related to the Court.

[15] PW2 said that she heard the deceased "raising an alarm". She went to the deceased's house and found him lying dead on the floor. She saw the Appellant outside the deceased's house.

[16] Detective Myeni testified that after warning the Appellant in terms of Judges Rules, he interrogated him at the scene. The Appellant produced from under his pillow a knife that was bloodstained but looked as if it had been washed or wiped.

[17] At the conclusion of the Crown case the trial was postponed to a later date. On the resumption in August 2005, counsel for the Crown stated that he wished to draw the Court's attention to the psychiatric reports mentioned earlier in this judgment and asked permission to read them into the record. Mr. Simelane for the defence agreed that the

reports should be admitted into the record of evidence saying that "we were going to hand in the reports into court ourselves even if the Crown had not done so...". The learned trial Judge thereupon confirmed that the reports were to "be admitted by consent in both the form and content" and that they were "placed before the Court as evidentiary material by consent".

[18] Both counsel stated to the Court that the purpose of placing the psychiatric reports before the Court was to require the Court to consider making a finding in terms of Section 165(1) of the Criminal Procedure and Evidence Act No. 67 of 1935 (the Act). It is therefore convenient now to set out the provisions of that section. It reads as follows:

> "*165(1) If an act either of commission or omission is charged against any person as an offence and it is given in evidence on the trial of such person for such offence that he was insane so as not to be responsible according to law for his act at the time when it was done, and if it appears to the Court before which such a person is tried that he did the act but was insane as aforesaid at the time when he did it, the Court shall return a special finding to the effect that the accused did the act charged, but was insane as aforesaid when he did it.*"

There was, at that stage of the trial, some debate as to whether the trial Court should, if so minded, make a finding in terms of Section 165(1) or whether the Appellant should enter upon his defence by giving evidence if he chose to do so and/or calling any witnesses. The learned trial Judge ruled that the Appellant should enter upon his defence.

In so ruling the learned trial Judge was clearly correct. Section 165(1) enjoins the Court, before its provisions can be invoked, to make a finding that the accused did the act charged. In order properly to do so the trial Court would obviously have to consider not only the evidence of the Crown witnesses but also whatever evidence the accused might adduce before it. It would therefore be necessary for the accused to give evidence, if he chose so to do, and/or to adduce evidence on his behalf.

In *casu* the Appellant chose to testify. His version of events was that he had not stabbed the deceased. He was awoken from his sleep on the fateful morning by an over-loud radio in his father's bedroom. He then heard the kitchen door being opened and closed. He got up intending to go to the outside toilet when he heard the deceased raising an alarm. The deceased was shouting "come and help me there is someone killing me". He ran back into the house, picking up a tyre lever on the way. He opened the door to the deceased's bedroom. He saw that the deceased was alone in the bedroom. He called to PW1 but got no response from him. The deceased was kneeling on one knee. He went to assist the deceased to get him onto his bed. He then saw that the

deceased had a knife in his back. At that stage PW1 entered the bedroom carrying a knife. PW1 aimed the knife at him. The Appellant thought PW1 "wanted to stab me also". The Appellant said he took the knife out of the back of the deceased. His mother then arrived on the scene to help the deceased. He, the Appellant, left the deceased's bedroom and went into his own, still carrying the knife. He noticed, too, that his bedroom window was open. He lifted the curtain on the window and saw a person in the family yard, running away from the homestead. He thought the person was his paternal uncle, who was not mentally stable. He handed the knife to the police on their arrival. The Appellant said that PW1 was lying when he said he saw the Appellant stabbing the deceased.

[22] Asked about his admissions from 1994 to the National Psychiatric Centre he said that as from 1994 he had a fear that there were some family members who wanted to kill the deceased and wanted to use him as the scapegoat so that he would be liable for the deceased's death and not them. He had only smoked cannabis once. He used to lock himself in his room because of his fears that there were people who wanted to kill the deceased and as nobody was prepared to hear him on that, he decided not to involve himself in it. Those people wanted to cause "hatred, enmity, confusion and division" between him and the deceased.

[23] Questioned under cross-examination as to why his story that PW1 was wielding a knife and wanting to stab him was not put to PW1, he said he had told his attorney about it but the

> latter advised him that doing so would "delay the Court" and "would mean there was bad blood between him and PW1". He said the attorney said it was not proper to do so and he feared that the attorney might withdraw from the case and so cause him to spend more time in custody. He pretended to be cooperating with Mr. Simelane even though he did not agree with what Mr. Simelane was saying to him. He was not the one putting questions to the witness and although he gave instructions to Mr. Simelane to put the relevant questions to the witnesses, Mr. Simelane advised against such instructions "and he had no powers to put such things to those witnesses".

He said PW1 and other relatives were trying to implicate him in the deceased's death. There was nothing he could explain to PW2 as there was bad blood between them and she "could not hear anything as she was just insulting me." He had therefore only explained what had happened to his grandfather. He went on however, to say that his grandfather was among those sowing seeds of enmity and hatred between him and his father.

The Appellant said he had told the police that he did not stab the deceased but went to assist him and that he had taken the knife out of the deceased's back. This, too, was not put to the police in cross-examination for the same reason, said the Appellant, that he was advised that it should not be put.

The Appellant went on to say that there were people who were bewitching him. He told the deceased about that, who in turn, told his grandfather. The latter took him to a traditional healer who told him who the persons were who were responsible for his illness. His grandfather told him where his father was getting his muti from. He expected his grandfather to cause harmony within the home but he had not done so. He even "protected those people that were said to be responsible for my illness".

[27] The Appellant, moreover, denied telling Dr. Ndlangamandla that he had found his father lying on his bed, had started stabbing him and had killed him "because of all the things he had done against him. Bewitching him, sabotaging his business plans and being against him buying a car". Dr. Ndlangamandla had made all this up against him.

[28] The Appellant called no further witnesses. Neither counsel for the Crown nor Mr. Simelane chose to call Dr. Ndlangamandla but submitted that this Court should call him to testify. The learned Judge stated that the psychiatric reports spoke for themselves and that counsel, and particularly Mr. Simelane, felt that calling Dr. Ndlangamandla could not add to what was contained in the reports. He therefore ruled that it was not necessary to call him. In that regard, too, I think that the learned Judge was correct. The reports were full and set out in clear terms. Also, as stated earlier herein, both counsel agreed that they

should go into the record by consent, as evidence of their content.

No further witnesses were called for the defence and Mr. Simelane then closed the defence case.

In a detailed and well reasoned *ex tempore* judgment, Annandale ACJ found that the Appellant had killed the deceased. He was cognisant of the fact that PW1 was a single witness as to actual stabbing of the deceased, who had died as a result of the stab wounds inflicted on him, but found PW1 to have been a credible witness whose testimony was corroborated by the circumstantial evidence of the events at the scene. He rejected the version of the Appellant who, he said, had not made a favourable impression as a witness on him. The alleged presence of some unknown intruder who had apparently stabbed the deceased featured only in the Appellant's evidence. None of the other people at the homestead mentioned a word of such an unknown person who fled after the killing.

It was also noteworthy that the Appellant's story that PW1 had come into the bedroom when the deceased raised the alarm carrying a knife with which he aimed at the Appellant, causing him to think that PW1 "wanted to stab me also" was not put to PW1.

[32] I have grave difficulty in accepting the Appellant's statement that he told Mr. Simelane of this but that Mr. Simelane refused to put it to PW1. Mr. Simelane is an experienced legal practitioner. His cross-examination of PW1 was full and

thorough and he put the Appellant's version of an unknown intruder to PW1. It is, therefore, in my view, inconceivable that he would not have put to PW1 the Appellant's allegation that PW1 had a knife which he aimed at the Appellant. Moreover, it is significant that the Appellant said he thought PW1 wanted to stab him "also", thereby wanting the trial Court to infer that it was PW1 who had stabbed his father, which, of course, runs contrary to his version of an unknown intruder who had done so. The story of the unknown intruder is also inconsistent with what he told Dr. Ndlangamandla viz that he had killed his father because of what the latter was doing to him i.e. thwarting his plans and bewitching him.

[33] I accordingly hold that the learned trial Judge was correct in finding that it was the Appellant who had fatally stabbed the deceased.

[34] Annandale ACJ thereupon made a further finding viz that the Appellant was insane at the time he did the act with which he was charged. He did so on the basis of the psychiatric reports which, apart from counsel for the Crown and defence being ad idem that the expertise, opinion and validity of the psychiatric assessments were not in issue, he found to be reliable. The psychiatric assessment was, as set out above, that the Appellant -

> "*when he committed the crime he acted on his delusional beliefs as he falsely believed that his father was responsible for his failures. He cannot be held criminally responsible for his actions as he laboured under delusions when he committed the offence.*"

[35] Annandale ACJ accordingly entered a special finding under the provisions of Section 165(1) of the Act -

> "*that the accused person did the act he was charged with but that he was insane when he did it.*"

In consequence of this finding he made the following order in terms of Section 165(2) of the Act -

> "*It is ordered that the accused person be kept in custody as a criminal lunatic at Matsapha Central Prison pending a directive by His Majesty. The Attorney General shall receive an appropriate report for the information of His Majesty*".

[36] The Appellant has now appealed to this Court against the special finding and order of the Court *a quo.*

[37] The Appellant, who argued his appeal in person, has raised a number of points. These in the main related to the finding of the Court *a quo* that the Appellant was not to be held criminally responsible for his actions as he laboured under

delusions when he committed the offence. He handed to the Court handwritten notes containing his main submissions.

[38] The Appellant submitted that the trial Court ought to have called Dr. Ndlangamandla and members of his family to testify at the trial. The reason why Dr. Ndlangamandla should have been called, he said, was because he had not told the doctor the things the latter had recorded in his report. He had only told him about the events that had led to his admissions to the mental institution in July and October 1998. He had not been given a chance, he said, to "make my defence before him". Dr. Ndlangamandla did not give him a chance to tell him what he told the trial Court. He also denied telling Dr. Ndlangamandla that he had killed his father or that he had done so because of what his father was doing to him.

[39] Again, I have difficulty with this submission. Dr. Ndlangamandla's report of 26 October 1998 is a detailed and compehensive one. It is to me incomprehensible that if the Appellant had sought to tell Dr. Ndlangamandla his version of the events surrounding his father's death that Dr. Ndlangamandla would not have listened to him and recorded what he had said. It is also inconceivable to me that Dr. Ndlangamandla would, of his own accord, have made up what is contained in his report, as the Appellant suggests he did. I am quite unable to accept this.

[40] The Appellant also averred before this Court that Dr. Ndlangamandla "suffered a paralysing stroke" after he wrote his report of 26 October 1998 and that this Court should consider the possibility that when he was preparing his report, he was about to be attacked by the stroke which may have "affected him mentally or otherwise to write an insulting and condemning assessment report as he did."

[41] There is no substance in this submission, which borders on the absurd. In any event, the Appellant was also examined by Dr. Hilary Dennis whose conclusions as to the Appellant's mental condition coincided with those of Dr. Ndlangamandla. Moreover, far from the latter being condemnatory of the Appellant, it was he who certified in 2004 that, although the Appellant was "psychotic and euthymic" he then showed no features of mental illness and was fit to stand trial.

A most significant fact in relation to Dr. Ndlangamanda's report of 26 October 1998 is that in April 2000, so the Appellant told this Court, he took the report from Dr. Ndlangamandla "against his will" and tore it into pieces, necessitating Dr. Ndlangamandla having to make a printout of a copy of the report from his computer, where the report had been stored. It would seem, from this action on his part, that the Appellant hoped that the content of the report would not be available to be used in any subsequent proceedings against him.

The reasons advanced by the Appellant as to why members of his family should be called were that it was they who had caused him to be sent to mental institutions in the past to get him out of the way. If they had been called to give evidence they would have had to say that he was not mentally disturbed when they sent him there. On this aspect his handwritten notes contain the following statement, which, it seems, at some stage he had sought to delete, viz,

> "*They sent me into the mental hospital also to embarrass me, to spite me, to hurt me and to put my home into disrepute in the community standing.*"

[44] Appellant submitted that, as appeared from his evidence at the trial, his grandfather showed him the place where he suspected his father and other family members bought the muti "they used to bewitch me". In reply to a question by this Court as to whether he believed his father was bewitching him, the Appellant replied that he did.

[45] In respect of both the Appellant's submissions that I have set out in paragraphs (43 and (44) above, there is nothing contained in them which would entitle this Court to interfere with the findings of the trial Court. Indeed, the Appellant's criticism of the validity of Dr. Ndlangamandla's report; his comments on the members of his family and their motives in having him admitted to the mental hospital when they did; and his belief, repeated in this Court, that his father was

bewitching him, tend, in my view, to lend support for the opinions of the psychiatrists that the Appellant suffers from delusions of persecution.

[46] Save for repeating in this Court that he had not killed his father, by which, I will accept, he intended to convey to the Court that he is innocent of the crime with which he was charged, the Appellant, neither in his written nor oral argument sought to challenge directly the finding of the trial Court that he did the act of fatally stabbing the deceased.

[47] The appeal can, therefore, in my opinion, not succeed. I would, however, add a comment. The Appellant told this Court that he was refusing to take the medication prescribed for him by the medical practitioners in the institution where he is presently being detained because, he says, he is not mentally ill. He went on to say that his situation was "out of control". The medical practitioners, he tells this Court, see him once a month. His fitness or otherwise to be discharged from detention no doubt depends on their evaluation of his mental condition when they see him. It seems to me that it can only be to the Appellant's advantage to cooperate with those concerned with the care and treatment of him in his present place of custody which cooperation, I would think, would include being willing to take such medication as may be prescribed as part of that treatment.

[48] In the result, therefore, the appeal is dismissed and the finding and order in terms of Sections 165(1) and (2) respectively of the Act by the Court *a quo* are confirmed.

P.H. TEBBUTT JUDGE
OF APPEAL

J.'BROWDE

I
agree

ACTING JUDGE PRESIDENT

I agree

R. BANDA

JUDGE OF APPEAL

Delivered in open Court this 9 day of May 2007