IN THE HIGH COURT OF SWAZILAND

CRI .T. S . 18/77

In the matter of:

REX

versus

1. THEMBA MASUKU

2. MUSA MNGOMEZULU

CORAM:	C. J. M. NATHAN, CHIEF JUSTICE
ASSESSORS:	NTSHALINTSHALI AND DLAMINI
FOR CROWN:	C.U. ONUOHA
FOR DEFENCE:	W.M. PUPUMA, for 1st Accused
	E.M. MABELETSA, for 2nd Accused

JUDGMENT

(Delivered on the 8th August 1977)

Nathan, C.J.:

The two Accused are charged with the murder of the deceased at Phuzamoya on 26th December, 1976.

The evidence of Dr. Kruger who conducted the post-mortem examination was to the effect that the cause of death was a stab wound into the heart, inflicted with a sharp, broad, long instrument. There were three stab wounds in all, the one I have mentioned, and two into the back of the thorax which did not penetrate the chest.

Apart from the medical evidence the Crown case consisted of the evidence o£ a young boy aged 13, Themba Dlamini, who purported to be an eye witness of the stabbing, and of two statements made by the Accused to the Judicial Officer Mr. J.J. Matsebula. It will be convenient to refer first to these statements, to the admissibility of which there was no objection by either of the Accused.

No.1 Accused said in his statement that he had been drinking beer at a homestead with a friend. It is common cause that this friend was No.2 Accused. According to No.1 Accused the friend saw somebody carrying money and suggested that they

should grab this person and take his money. No.l Accused agreed. He says that when this person (the deceased) was going away from the homestead he (No.l) said "There goes that person. He (i.e. No.2 Accused) suggested that I go and block his way. I followed after him and blocked his way. I blocked his way and grabbed and threw him to the ground. He struggled (resisted, and would not go down. My friend came up, produced and handed me a knife. I stabbed the person. I inflicted two stab wounds at the back and he tried to get up. I inflicted one stab wound in the chest. Then my friend ran away and I also ran away. I found him and gave him his knife".

The remainder of this statement is not material, save that No.1 Accused says that later that night he ran away and was eventually found in Manzini.

No.2 Accused's statement, in contrast to that of No.l Accused, is exculpatory. He says that he was drinking with a friend. A certain man Gadlela (i.e. the deceased) was there. No.2 Accused left his friend and went to jive. The statement continues "When I returned to him he asked if I could see (was aware) that Gadlela had money on him. I asked what he expected me to do about it. He said (suggested) that we should go and rob him and take the money away from him. I refused. It then started raining and as we were seated outside I ran inside a hut. I suddenly saw my friend run after Gadlela. I went out and followed him too. I found that my Mend had blocked Gadlela's way and had felled him to the ground. I asked what he was then doing to Gadlela. However Gadlela was also fighting and my friend stabbed him three wounds at the back and one wound in the chest..... This young man had already taken Gadlela's money".

The remainder of this statement is irrelevant.

The young boy Themba, although I am satisfied that he was a perfectly honest witness (he gave evidence on oath after I carefully admonished him to tell the truth) gave a very confused and incoherent account of what he saw. He said he

had seen the two Accused at the beer drink. When he left to go home and study he was followed by the deceased. The two accused also left the beer drink and walked fast in a different direction. But they apparently caught up with the deceased when Themba was some 60 yards (indicated) away. He said "No.1 Accused pushed the deceased to the ground. The deceased then called my father. The deceased was then dying". Asked "Where was No.2 when No.1 pushed the deceased?," he replied "No.2 was already going then". However he followed this up by saying he saw No.2 take something from his bag and give it to No.l Accused. This was, he said, before No.1 Accused pushed the deceased.

Q: by Court "Do you know how he died?"

A: "Yes. He was stabbed. No.1 Accused stabbed him".

Q: "Did you see that?"

A: "No."

Q: "Well how do you know he was stabbed?"

A: "I heard my mother say someone was stabbed and then I saw No.2 take out a knife and give it to No.1. I could not see whether No.1 stabbed the deceased or not as the deceased already had wounds at the time".

Q: "Where did he get these wounds from"?

A: "They were stab wounds".

Q: "How did he get these?"

A: "He was stabbed by No.1". "Did you see this yourself or is it what your Mother told you"?

A: "I was told by my Mother." Under cross-examination he was asked

Q: "You say No.2 gave something to No.1. Did you see what it was"?

A. "He took it out quickly. I could not see what it was".

(My comment: Compare his evidence in chief).

Q. "Why did you say it was a knife?"

A. "I didn't see this thing when it was taken out and given to No.1. I only saw it when No.1 had it in his hand".

Later Q. by Court "Did you see them take money from the deceased?"

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A. "I did not see any money".

Under further cross-examination by Mr. Mabiletsa who appeared for No.2 Accused Themba repeatedly adhered to his original story that the knife was given to No.l after his mother had said somebody had been stabbed. This, of course, is nonsense. He further said his attention was drawn to the incident by the report from his Mother. He said he was inside the house when his Mother made the report; but he later changed this and said that the handing over of something to No.l and the pushing of the deceased happened before he got inside the house. In reexamination, however, he was asked

Q: "What did you do after No.l pushed the deceased"?

A: "Nothing. I went back inside the hut".

Q: "I thought you had not been in the house"?

A: "That is correct".

My assessors and I find it impossible to place any reliance upon Themba's evidence.

No.1 Accused made an unsworn statement from the Dock, upon which he could of course not be cross-examined, in which he substantially confirmed his statement to the Judicial Officer.

No.2 Accused closed his case without leading any evidence or making any statement.

I have no doubt that No.1 Accused is guilty on his own statement to the Judicial Officer. In terms of Section 238(2) of Act 67/1938 an accused may be convicted on his own confession, although such confession is not confirmed by any other evidence, provided that the offence has, by competent evidence other than such confession, been proved to have been actually committed. It was submitted, somewhat faintly, by Mr. Pupuma on behalf of No.1 Accused that there was insufficient corroboration. There is no merit in this submission. It is clear on the medical evidence that the deceased was stabbed to death; and the evidence that the offence has been committed

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does not have to be evidence incriminating the Accused.

No.1 Accused is found guilty of murder as charged.

In regard to No.2 Accused the only evidence against him is his statement to the judicial officer which, as I have already pointed out, is exculpatory. No.1 Accused's statement is not admissible evidence against No.2 Accused (Section 228 of Act 67/1938); nor is No.1 Accused's unsworn statement from the dock. Themba does implicate No.2 Accused; but I have already pointed out that no reliance can be placed on

his evidence. Mr. Onuoha for the Crown submitted that apart from Themba's evidence there was evidence of common purpose; but this submission breaks down on examination. No.1 Accused's statement in regard to the planning of the robbery is not evidence against No.2 Accused. On No.2 Accused's statement he was not prepared to be a party to a robbery. Mr. Onuoha submitted that it was sinister that No.2 Accused followed No.1 to see what was happening between him and the deceased. I do not agree. It is perfectly consistent with his innocence that No.2 Accused should have done this. Mr. Onuoha finally invoked No.2 Accused's failure to give evidence. This may, according to the circumstances, be a factor to be taken into account; but in the present instance I do not think it tends to show No.2 Accused's guilt. There must be a proper case in law for an accused to meet before there is any obligation upon him to give evidence; he is under no obligation to make a case for the Crown.

In the result my assessors and I find that the Crown has failed to establish its case against No.2 Accused; and he is found not guilty and is discharged.

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JUDGMENT ON EXTENUATING CIRCUMSTANCES

No.1 Accused has been found guilty of murder by stabbing the deceased. This took place in the course of what was, on No.l Accused's own statement, a planned robbery. I have to decide whether there are any extenuating circumstances which would justify the Court in imposing something less than the death sentence. It is clear law that the onus of establishing extenuating circumstances rests upon the Accused. In the present case the Accused has called no evidence in this regard, and has contented himself with an address by his counsel, Mr. Pupuma.

Mr. Pupuma urged the following matters, which he submitted amounted to extenuating circumstances:

a) the comparative youth and immaturity of the Accused who he said was aged about 25;

b) the fact that the accused had been drinking;

c) the fact that the murder took place on Boxing Day, in the Christmas season.

In regard to youth and immaturity, there is firstly no evidence before me in this connection. But even assuming that the Accused is only 25 years old this does not in my opinion operate as an extenuating circumstance in the case of a planned robbery such as this. It in no way operates to lessen the moral responsibility of the Accused, which is the test laid down in such cases as R. v. Fundakubi, 1948(3) SA 810, (A.D.), and S. v. Letsolo, 1970(3) SA 476 (A.D.).

In regard to drink, there is no evidence that the Accused was intoxicated. There is a suggestion in the statement of No.2 Accused who was found not guilty, that he and No.l Accused had been drinking since the early morning. But this statement is not evidence against No.l accused and in my view it cannot operate in his favour. In any event the fact that the Accused may have been drinking for a lengthy portion of the day does not, in my view, and having regard to the fact that the onus rests on the accused in this enquiry, amount to sufficient evidence to operate as an extenuating circumstance.

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In regard to the Christmas season, this too in my view does not operate as an extenuating circumstance reducing the moral blameworthiness of the accused. Christmas is a time of goodwill towards all men. It certainly does not involve a licence to rob and to murder innocent persons.

I have also considered whether the fact that the offence may have been planned on the suggestion of No.2 Accused and the knife used obtained from him can be an extenuating circumstance. In my opinion this must be answered in the negative. The fact that No.2 Accused has been acquitted in no way reduces the moral responsibility of No.1 Accused, the actual perpetrator of the murder.

I come to the conclusion that no extenuating circumstances have been shown to exist. Counsellor Ntshalintshali agrees with this conclusion. Counsellor Dlamini is somewhat dubious about the matter but is not prepared to dissent from the majority view.

On the finding that there are no extenuating circumstances this Court is obliged to pass sentence of death. I should say, however, that it is possible that the Prerogative of Mercy Committee may take the view that the sentence should be commuted to one of imprisonment for a lengthy period - I have in mind a period of 15 years imprisonment. They might be influenced to this conclusion by the considerations of No.2 Accused having been acquitted, of this being the Christmas period and the accused having taken drink, and by Counsellor Dlamini's dubiety. As matters stand, however, I must proceed to pass the death sentence.

The sentence of the Court is that you be returned to custody and hanged by the neck until you are dead.

(C. J. M. NATHAN)

CHIEF JUSTICE