

IN THE HIGH COURT OF SWAZILAND

CRIM. CASE NO.5/86

In the matter of

REX

VS

MAGUNGWANE SHONGWE

MANIKI DLAMINI

SITSEBE SHONGWE

MADLELA NDWANDWE

LOZINDLELA LAMULA

CORAM: HANNAH, C.J.

FOR THE CROWN: MR. M. NSIBANDZE

FOR THE DEFENCE:	MR. T. MASINA	FOR	ACCUSED No.1
	MR. M. MAMBA	"	" 2
	MR. W.M. PUPUMA	"	3, 4 & 5

JUDGMENT

(5/5/86)

Hannah, C.J.

In this case five accused pleaded not guilty to the murder of Njani Kunene but two of the accused have been acquitted during the course of the trial and the Court is, therefore, now concerned only with the three accused first named in the indictment.

Although the trial has covered five and a half working days the evidence to be considered falls within a fairly short compass. It is not really in dispute that on 17th November, 1983 Njani Kunene (to whom I shall refer as "the deceased"), a boy of about ten years of age, was murdered and his body mutilated for ritual purposes. His body was discovered some days later floating in the Komati river in the north of the country and the condition of the body may be observed from a series of photographs taken by a police

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photographer (exhibit 6) and is described in a post-mortem report prepared by the late Dr. Khare. The skin and flesh had been peeled from the skull, the ears, eyes, nose and lower jaw were missing, soft tissues in the upper half of the neck and the tip of the tongue were missing, the perineum and genitalia were missing, the tibia in the left leg was exposed and the fibia bone missing and the ankle bone was severed. The extent of the mutilation is a shocking sight to observe.

Mjoniseni Mkhabela (PW1) is in his thirties and is a resident of the Mashobeni area where the murder took place. He has already been tried and sentenced for his part in the offence and, save for the

substitution of an eight year prison sentence for the death sentence imposed at his trial, his appeal has been dismissed. Although he does not, therefore, fall into the usual category of accomplice, namely, a man who is not charged in the indictment and who is at risk of prosecution unless the court finds his evidence to be satisfactory, he is, nonetheless, an accomplice and must be treated as such when his evidence is considered. He is a man who has "inside" knowledge of the crime and who may, for a variety of reasons, have a motive for falsely implicating the accused in the offence and whose evidence must, therefore, be approached with great caution. The Court must, and does, remind itself that it would be dangerous to act on his evidence, however credible it may appear to be, unless it is corroborated in a material respect in the case of each accused.

The first accused is the Chief of the Shongwe tribe in the Mashobeni area and, according to the evidence, is a man of considerable authority in that area. The second accused is an inyanga or medicine man and, according to the evidence of the accomplice, the third accused is one as well. Both are members of the first accused's

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inner-council. The second accused resides within a kilometre or two of the accomplice's homestead (the sketch plan shows both their homesteads) while the third accused resides further away.

The deceased was the nephew of the accomplice and at the material time was on "loan" to him by his parents as a herd-boy. I The accomplice said that in the summer of 1983, a simple calculation of days puts this as Tuesday 8th November, the first accused came to him and asked that he should allow the deceased to be his herd-boy. The accomplice said that he refused and explained to the first accused that that was the very job the deceased was performing for him. Some days later, at first the accomplice said it was one week later but then said it was during the same week, the second accused came to him and enquired whether he, the accomplice, understood that the first accused wanted the deceased as a herd-boy. The accomplice said he explained to the second accused that he had been obliged to refuse. Then, he said, the first accused approached him again and on this occasion was more explicit. According to the accomplice the first accused said that he wanted the deceased in order to strengthen himself as chief because his people did not respect him. Whether the first accused said in terms that he wanted to kill the deceased is not altogether clear but this was the way in which the accomplice understood the request. The accomplice said he again turned down the request and the first accused then threatened to expel him from the area. A further visit from the second accused was made to reinforce this request and then on a third occasion the first accused informed the accomplice that a fence next to the Komati river was broken and that he should take the deceased there on a certain Thursday to recover a cow. Again the second accused spoke to the accomplice to reinforce this particular demand.

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The accomplice was not consistent as to the precise timetable of these various approaches but I do not consider much turns on this. The events spoken of, if they occurred, happened some two and a half years ago and it is highly unlikely that details such as these would be recalled with any precision. If it has any significance at all the inconsistency on details such as these tends to show that the evidence of the accomplice has not been rehearsed.

Thus it came about, according to the accomplice, that on a Thursday - the day can be identified as 17th November 1983 - he and his brother Makhombane (PW4) set off for the grazing lands to find the deceased with the intention of taking him to a meeting with the first accused at a place where the fence was broken.

I pause here in the narrative to mention that the accomplice said that he had informed his brother, PW4, of the demand made by the first accused and the accompanying threat of expulsion if he did not obey so as to obtain his brother's opinion on the matter; but, he said, the brother treated it as a joke. According to the accomplice the position on that Thursday was, therefore, that despite what had been said to him earlier, he, the accomplice, thought that the command to bring the deceased to fetch a cow was a

genuine one and, had he thought otherwise, he would not have kept the assignation. PW4, he said was in a similar state of mind.

PW4 denied that his brother, the accomplice, had told him anything about the matter but said that the second accused had, himself, informed him of the request made to the accomplice and had said that he, PW4, would receive forty (pounds or emalangen) if he cooperated. He said that he had told the second accused that he wanted nothing to do with the matter.

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The assessors and I have carefully considered the foregoing evidence. We do not believe the evidence of the accomplice that he was not aware of what was to become of the deceased when he went to take him to the first accused on the 17th November nor do we believe that PW4 was as innocent of involvement in this matter as he would have us believe. We believe that if the accomplice was approached by the first and second accused in the manner described, and whether he was or not will be considered in due course, his cooperation was much forthcoming than he now maintains, and the probability is that the reward for his services which, he said, was promised after the murder had taken place, was made much earlier on. In this respect and indeed other respects, we have no real doubt that the accomplice in his evidence is endeavouring to put himself in a better light than he deserves. To the question why should he, a convicted prisoner, with nothing to lose, endeavour to do this the answer, we think, is two-fold. Firstly it is human nature to try to absolve oneself of responsibility in a case such as this and, secondly, there must be a strong temptation to keep to the confines of the account which was probably advanced at his trial.

To return to the narrative, the accomplice said that he and PW4 found the deceased with two other boys, Mahhabenyoni Mhlanga (PW3) and Mapuludi Mhlanga (PW8), and, having sent these two boys to fetch some donkeys, he then set-off for the broken fence with the deceased leaving PW4 to wait for the donkeys. When they left the sun was still high (estimated by the Court as 1 to 2p.m.) and, after walking some three kilometres, he found the first accused seated with the co-accused and one other man beneath a Mkhiwa tree next to the broken fence. He and the deceased were told to sit in the middle of the group and were ordered to take some muti, the first accused explaining that a mamba snake had been seen nearby and the

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muti would give protection against snake bite.

Again, I pause here to deal with this piece of evidence which, in cross-examination, assumed rather more significance than first appeared to be the case. In his evidence in-chief the accomplice merely said that the "muti" caused him to be dizzy and that his vision became blurred; but in cross-examination he went much further. He said that from the time he took the muti and for some three Weeks thereafter he suffered hallucinations. He said that during the events which followed the accused appeared to him at times to be ferocious dogs and some of them appeared to be snakes moving from the ground to the clouds. The investigating police officers who questioned him in the weeks that followed also appeared to him to be animals and he had an urge to run away from them. He said he became darker and thinner.

We have considered this with care and we have reached the conclusion that it is simply too far-fetched to be true. We think it most unlikely that any hallucinatory drug would have had such prolonged effect and, furthermore, we have very grave doubts whether the accomplice would have concealed such condition from those close to him. His brother, PW4, said he noticed nothing unusual about the accomplice's condition when he saw him later that Thursday evening or on subsequent days and no witness has testified to any abnormal behaviour by the accomplice. In our view, the accomplice has invented this condition in an attempt to reduce or hide his responsibility for the part he played in this crime to provide himself with the opportunity of blaming his role on the effects of "muti".

After the "muti" incident the accomplice said that the second and fifth accused struck the deceased on his head and chest with a root and then they all went to a place beyond the broken fence and on the river

bank where the first accused proceeded to throttle the

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deceased and to hold him under the water while the others held his legs. When it was apparent that the deceased was still alive the second accused struck him a fatal blow between the eyes with the blunt part of his axe. The first and second accused then performed some kind of ritual cleansing ceremony with a mixture of blood, water and muti and the body of the deceased was wrapped in sacking and hidden near the river.

The accomplice put the time of the killing as being about sunset. The sun, he said, was bright red on the mountain top. Sunset could have been no earlier than 6p.m. at that time of the year and if this piece of evidence be right it throws considerable doubt on the accomplice's earlier evidence that he met up with the deceased between 1p.m. and 2p.m. The three kilometre walk was traced by Inspector Vilakati (PW2), the investigating police officer, and he estimated the time taken as being thirty minutes. If this is right, and we have no reason to think that it is not, some three hours of the afternoon is unaccounted for.

We have considered this matter of time very carefully and, having regard in particular to other evidence which I shall come to shortly, we conclude that the evidence of the accomplice as to the time of meeting the deceased is completely wrong. In our view, the accomplice and the deceased set off for the river not early in the afternoon but fairly shortly before sunset.

In his evidence in-chief the accomplice went on to describe how the body of the deceased was retrieved when the moon was up but he made no mention of what had occurred in the intervening period. In cross-examination, however, he said that he had in fact gone off to kraal his cattle and then returned to the accused. Again, we have considered this piece of evidence with some care and we do not consider it to be the action of a man in a hallucinatory state nor

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do we consider it to be the action of a man who had unwillingly participated in the murder of his nephew, as the accomplice maintains it was. That the accomplice felt able to go off and perform the everyday task of herding cattle is, we think, indicative of his full comit-ment to participation in the offence. That he did carry out this chore is confirmed by PW4 who said that he found the accomplice herding cattle. He said he asked where the deceased was and the accomplice said he was already dead. In cross-examination he amplified this by saying that the accomplice had told him that it was the second accused who had actually done the killing and that they had told him to kraal his cattle and return after dark.

PW4 was cross-examined at some length on his reaction to the news that the deceased had been murdered. His attitude was, in effect, that the whole matter had nothing to do with him. He was hesitant and evasive and said that as the deceased had been performing services for the accomplice and not himself it was no concern of his. If a report was to be made that was the accomplice's affair. He did nothing to prevent the accomplice from returning. We did not find PW4 to be a credible witness in this regard. He appeared to us to be frightened and we are of the view that his knowledge of what occurred that day is greater than he is prepared to say. Save where his evidence accords with other reliable evidence it cannot, in our opinion, be relied upon.

Continuing with the narrative, the accomplice said that the body of the deceased was carried on sacking to an abandoned homestead where he, the accomplice, was made to cover bis head with a coat while the body of the deceased was cut up. He said he heard the first accused tell the second accused that the fifth accused had said that they must begin from the head and then from just below the navel to the testicles. He then heard chopping noises and when all

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was done he saw the body of the deceased in some sacking with some grass over it. The fifth accused

had a plastic bag in which it seemed the parts had been placed. He and the second accused then went in the direction of their respective homesteads while the rest went in the direction of that of the fifth accused. Later when the body of the deceased was recovered and the police were called in the accomplice said he informed the police of the involvement of the five accused. I now turn to the evidence of Mahhabenyoni Mhianga (PW3) and Mapuiudi Mhlanga (PW8). The two are brothers and we estimate their age as sixteen years and eight to ten years respectively. Both said they knew the first, second and third accused well. The first accused was their chief, the second accused their close neighbour - he lived within "shouting" distance - and the third accused was known to them by sight as a man who lived in their area and who came drinking at their parent's homestead.

On the Thursday in question they were both at the grazing lands with the deceased and both said that while there they saw the first, second and third accused not far from where they were. Naturally there were divergencies in their evidence as to distances and certain other minor details but apart from these, which we consider to be perfectly understandable in view of the time which had elapsed, their evidence was, we thought, remarkably consistent.

PW3 said he first noticed the first accused when he passed him along a nearby footpath, he estimated the distance as thirty metres, and then he saw him seated on a stone at a distance of some one hundred and fifty metres. He then saw the second accused "peeping" at them from a thicket. The third accused was seated near the other two. PW3 was cross-examined at some length and it is fair to say that his evidence in cross-examination was punctuated by pauses. My assessors are of the view that he was over-awed by the proceedings and not least by the fact that his chief was seated in the dock

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not far away and that although he was clearly considering his answers this should not be regarded as a sign of untruthfulness. I agree with this assessment of his demeanour. PW3 was questioned about the clothes worn by the first accused and gave quite a full description. As for the second accused the witness said he was no more than ten to fifteen paces (again estimated) when he saw him go past and when he was peeping from a mango tree he was some thirty metres away. In the case of the third accused he was wearing faded black overalls and he was adamant that his identification was correct. He knew all the accused well and there was no room for mistake.

At the end of cross-examination PW3's evidence was unshaken even though various discrepancies between his testimony and the written summary of his evidence had been put to him. Of these discrepancies he said that the summary or the statement upon which it was based was wrong. One further piece of evidence given by PW3 was that on the following day the first accused spoke to PW8 and himself and asked if they had seen him. When they said they had he told them not to mention this to anyone.

It is difficult to estimate PW8's age. The best we can do is to put it in the range of eight to ten years and because of it I took the view that he should not be sworn. Instead he was admonished to tell the truth and there is no doubt in my mind that he fully understood the importance of doing so. In November 1983 he could have been no more than seven years of age and it is quite understandable if his mind did not register or retain as much detail as his older brother particularly when it is borne in mind that what he observed was, at the time, of no great consequence to him. He did not see, or does not recall seeing, the first or second accused passing by as PW3 says they did. All he recalls is seeing the first three accused nearby next to a mango tree. Further, he does not recall the first accused speaking to him and PW3 subsequently, He do not, in the circumstances,

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attach much importance to these discrepancies between his evidence and that of his brother nor do we see as significant the difference in their evidence of the distances involved. His description of the first accused's clothing agreed with that given by PW3 and he was as adamant as PW3 that the persons seen lurking nearby, and lurking is, I think, really the most apt description of what was happening, were the first

three accused. As with his brother he appeared nervous in the witness box and frequently glanced at the dock before answering questions. We did not, however, have the impression he was lying. On the contrary, insofar as demeanour counts for anything our impression was that he was being truthful.

In considering the evidence of PW3 and PW8 we have taken full account of their demeanour and the discrepancies which exist, their ages and the need to have corroboration of a ten year old. We have also taken account of the fact that it would appear that initially they gave a different account to the police. We have not been told what that account was but if, as we think, they failed to mention seeing the accused that, in our view, was the result of pressure being brought to bear upon them by the first accused in the manner described by PW3. On the vital question whether they indeed saw the first, second and third accused late that afternoon we are satisfied that they are credible and reliable witnesses. We also accept that the event described by them occurred near to sunset.

I have already said of PW4 that we would not be prepared to accept his evidence where it stands alone but that part of it which puts the first three accused close by to the point where he and the accomplice found the deceased with PW3 and PW8 does accord with the evidence of the latter two witnesses and that part we do regard as credible.

I now turn to the evidence of the first accused and if I deal with it fairly briefly it should not be thought that we have not

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considered it in all its detail. He gave a detailed account of how, on 17th November, he visited Tongah in the Republic of South Africa to attend a meeting of his people at the magistrate's court. The Crown does not dispute this visit and his passport bears out the fact that he crossed through the Matsamo border post that day and returned through the same border post on the 18th. He said that instead of returning to Swaziland on the afternoon of 17th November he and several others stayed at the home of his uncle, Joseph Shongwe, not far from the border post. His reason for doing so was that they knew that the border post, which closes at 4p.m., would have closed by the time of their arrival there. He said that following their arrival Joseph gave them some beer to drink - by this time it was dark - and then he had drinks at various huts in the compound. The evening was spent discussing the days events at the magistrate's court and eventually he retired to bed in the same hut as his brother, Sidumo, with whom he had been travelling that day. In the morning he and Sidumo woke up and having washed and had tea they left. Sidumo dropped him at the border post as he had to return to Tongah and he, the accused, crossed back into Swaziland and, having spent part of the morning at the homestead of the second accused, returned to his own homestead where he spent the rest of the day. It was not until Monday that he learned that the deceased was missing. He had, he said, nothing whatever to do with the killing of the deceased and had not approached the accomplice before the murder or after.

The Crown sought to meet the evidence of the first accused in the following way. Firstly, the investigating officer, Inspector Vilakati produced a sketch plan of the area which he had prepared. It is not drawn to scale but I find it very helpful. It shows the places where the accomplice maintained the killing and mutilation took place (X and J), the mango tree near where the deceased and PW3 and PW8 were when the accomplice and PW4 found them (M) the homestead

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of the second accused (G), the homestead of the first accused (A), the homestead of Joseph (Q), the border post (C) and a path which Inspector Vilakati said ran from near the first accused's homestead to the border fence and from there to Joseph's home. It is quite apparent from this plan and the Inspector's oral description of the distance involved that anyone at Joseph's place could, should he have wished, illegally cross the border fence and have been at point M within an hour or so. To be more specific, the first accused could have left Joseph's place at any time between 4p.m. and 5p.m. and been at that point at about sunset.

The first accused vehemently denied that this is what happened. According to his evidence he spent the evening and night at Joseph's place, first drinking with his brother Sidumo and others, then at various other huts and finally retiring to bed in the same hut as Sidumo. This, however, was not the position at all according to Sidumo who was called by the Crown as PW10. He bore out the first accused's testimony of the trip to Tongah and the stop-over at Joseph's place but he said that shortly after their arrival the first accused went off saying he was going to look for liquor. As with other witnesses PW10 had difficulty in relating time to the hours of the clock but despite this difficulty it clearly emerged that he put the departure of the first accused some time before 4,45p.m., an hour well known to, if not treasured by, civil servants amongst whose ranks PW10 numbers. The witness said he next saw the first accused some time before 8a.m. the following morning when he drove him to the border post. He did not know where the first accused had spent that night and although it was never put to him in cross-examination it is clear that so far as he is concerned the first accused neither drank with him after dark nor spent the night in the same hut with him.

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Although PW10 is not the first accused's brother in the sense of having the same mother and father - he is in fact his first cousin - they are brothers according to Swazi tradition and no reason ever emerged in the evidence why he should lie. It was not suggested that he and the first accused were on bad terms, the only suggestion made by the first accused being that he was afraid of becoming implicated himself. That, in the circumstances, we simply do not understand as a motive for lying. He gave his evidence in a calm and competent manner and impressed us as a reliable witness.

The second accused also gave evidence. He said that he spent the whole of 17th November at home. There was a "beer-drink" in the morning and it lasted all day. A friend, Kipsaie Shongwe and his two daughters-in-law were with him throughout the day and his son, Mangaliso, was also present after returning from work at about 4p.m. He referred to a quarrel between the son and one of the wives over a chicken which, he said, occurred in the evening. He denied ever having approached the accomplice or his brother with a view to obtaining the deceased for the first accused and he denied taking any part whatever in the murder. He had not, he said, had any trouble previously with the accomplice or his brother, he got on well with PW3 and PW8 who are his nephews by marriage and the evidence of these witnesses implicating him in the murder was unexplicable. None of the persons with whom the second accused says he spent the 17th November was called to give evidence but, of course, he was under no obligation to call them.

The third accused gave very brief evidence and what he said simply amounted to a bare denial. He spent the whole of 17th November 1983 at his homestead constructing a kraal for his goats and he said he knew nothing of the killing. He did not know the deceased nor did he know PW3 or PW8.

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The third accused's evidence conflicts with that of PW3 and PW8 not only with regard to their identification of him on 17th November but with regard also to their evidence that he came to drink at their parent's home. He said he had never been to that homestead and did not even know where it was. He even went to the lengths of saying that he never drinks at homesteads other than his own. We simply do not believe him. We accept the evidence of PW3 and PW8.

I have already referred to certain unsatisfactory features in the evidence of the accomplice. He would have the Court believe that he is not guilty of the murder of which he was convicted. It never occurred to him, he said, that he was taking the deceased to his death on 17th November and such assistance as he gave in holding the deceased was involuntary. There is no doubt in our minds that in this regard the accomplice is lying.

It was suggested to the accomplice and, indeed, to the other prosecution witnesses that their evidence was motivated by a desire to rid the Shongwe tribe of the first accused as its chief. It was suggested that the tribe was divided and that the witnesses supported the claim of one Lomanyekula to the chieftainship.

This the witnesses denied and Lomanyekula, who was called by the Crown, also denied that there was any such rift.

We have weighed the evidence of the accomplice with very great care. We have taken note of the various points made in final submissions and agree that in a number of respects it is unsatisfactory. However, it does not follow that because an accomplice lies in order to minimise his role in an offence that all his evidence must be rejected. If this were so it would seldom be possible to secure a conviction on the evidence of an accomplice. We have considered his evidence in the light of the other evidence adduced both by the Crown and by the defence and have taken account of the criticisms levelled at it by defence attorneys. We have considered his evidence

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as it affects each accused separately. We are convinced that his evidence of the involvement of the accused in the killing of the deceased is true. We reject the evidence of the first accused that he spent the night of 17th November on the South African side of the border. We much prefer, and accept, the evidence of PW10 as to this and we are satisfied that the first accused slipped across the border fence in the afternoon of the 17th and then returned early on 18th in order to establish a false alibi. We are satisfied that he was correctly identified by PW3, PW4 and PW8 as one of those waiting men at the place where the deceased was collected by the accomplice and that thereafter his part in this horrible murder was as described by the accomplice.

We also reject the evidence of the second accused and the evidence of the third accused. We are satisfied that they also were correctly identified by PW3, PW4 and PW8 as the two men waiting with first accused and that their roles in what followed have been accurately related by the accomplice. Attaching possibly too much importance to the cautionary rule we concluded, however, that it would be unsafe to convict the fourth and fifth accused in the absence of some evidence corroborating the evidence of the accomplice in some material particular. In their cases the evidence of the accomplice stood alone whereas in the case of the other accused there was the sighting made by three witnesses, which contradicted the testimony of the accused and, of course, in the case against the first accused, there is the evidence of PW10. It should not be thought that we regard the fourth and fifth accused as innocent. The position is simply that we consider it would be unsafe to convict without some confirmatory evidence.

One further matter must be mentioned. When I have used the term "we" in this judgment, I have, of course, referred to myself and the assessors. However, the ultimate decision has, as must be,

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been my own though I am deeply indebted to the very great assistance the assessors have rendered.

The first, second and third accused are convicted of murder as charged.

#### SUBMISSIONS ON EXTENUATING CIRCUMSTANCES AND MITIGATION SENTENCE

I address myself first to you Magungwane Shongwe and you Maniki Dlamini. I must treat you both on the same basis. We do not consider that you, Dlamini, were subjected to any undue pressure. Your actions were, in our view, entirely voluntary and your part in this crime a major one. You are both men of authority in your area in the north of Swaziland. You are both men to whom the residents of your area should look to with respect. You are men to whom they looked for leadership and guidance and whose footsteps they are most likely to follow. I find it horrifying, therefore, that men like you should behave like primitive savages. If it is men like you that people look to for example then it is hardly surprising that cases of ritual murder are fairly common place in this court. You encourage the evil superstitions of a by-gone age. It is people such as you who bear responsibility not only for the ghastly death of the deceased, Njani Kunene, but also for that of others who meet with a similar fate. You thought that muti murder would strengthen your positions. You are so wrong. Evil crimes such as this destroy the doers themselves and the sooner gullible and superstitious people in Swaziland realise this the better. The assessors and I can find no

extenuating circumstances in your cases.

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Sitsebe Shongwe, you present this court with some difficulty. On the evidence your role was a lesser one than that of the first and second accused and we cannot discount the possibility, even probability, that you were under the influence of your co-accused. With some hesitation we have reached the conclusion that in your cast it is appropriate to find that extenuating circumstances exist. However, having said that I should make it clear that this Court does not feel that it can deal with you in the least leniently. You have lent your support to an evil and wicked crime. The sentence in your case will commence from the 5th June 1985 and it is one of fifteen years imprisonment.

The sentence upon you Magungwane Shongwe and Maniki Dlamini must be one of death. You will be taken to a place of custody and on a day and time to be appointed you will be hanged by the neck until you are dead. May the Lord have mercy on your souls,

N.R. Hannah

CHIEF JUSTICE