

IN THE HIGH COURT OF SWAZILAND

App. Case No. 14/87

In the matter of

SHAKASHAKA KUNENE

STANFORD NDWANDWA

VS

THE KINS

CORAM: MELAMET J.P.

WELSH J.A.

LEON J.A.

(06/04/88)

Melamet, J.P.

The two accused were found guilty of:

- (a) The murder of Muntu Shiba; Sindi Dikiza; Mafikizalo Shiba; Khosi Shiba; Sifiso Shiba; Zanele Dikiza and Kwane Shiba.
- (b) The attempted murder of William Shiba; Delisile Shiba; Thembisile Shiba; Anah Shiba; Sibongile Shiba; Bongani Shiba and Mandlenkosi Shiba.

The accused were sentenced to death on the first count and to 4 years imprisonment on the second count. The accused were charged with the above mentioned offences with one Benjamin Twala who was found not guilty and acquitted on both charges.

Accused No.2 Shakashaka Kunene originally appealed both against the conviction on the count on which he had been sentenced to death and against the sentence imposed upon him. On appeal counsel for

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accused No.2 although not abandoning the appeal against the conviction relied for this aspect only on the Heads of Arguments submitted by him. In convicting accused No.2 the court a quo relied on a confession made by the accused before a magistrate. There can be no doubt that the confession was freely and voluntarily made and that the court a quo properly admitted that confession and on account thereon to find the accused guilty on the counts as charged. Counsel for accused No.2 was correct in his approach in not pressing the appeal against convictions and I am of the opinion that there is no merit in the appeal against the convictions. The Notice of Appeal would appear to be directed only against conviction on count 1 but if there had been merit in such appeal it would obviously also have affected the conviction on count 2. It would appear that the appeal against the sentence by accused No.2 is directed only against the death sentence which was imposed on count 1. I shall return to the appeal against the sentence later herein.

Accused No.3 Stanford Ndwandwa appealed both against the conviction and sentence presumably on both counts. On appeal the appeal against the conviction which was also based on a confession by the accused was abandoned and the appeal proceeded only against the death sentence which had been

imposed on count 1. On appeal it was sought on behalf of accused No.3 to hand in certain affidavits dealing with the mental state and intoxication of the accused at the time of the offence. This evidence was intended only to establish extenuating circumstances entitling this court or the court a quo not to impose the death sentence in respect of accused No.3. The application to admit such affidavits alternatively to refer the matter back to the court a quo to hear and consider such evidence was ultimately abandoned on behalf of accused No.3.

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The appeal on behalf of both the accused proceeded on the grounds that the evidence led on behalf of the Crown and the confessions of the accused disclosed, on the probabilities, sufficient factors which mitigate the moral blameworthiness of the appellants to have entitled the court a quo to have found extenuating circumstances in respect of each of the appellants entitling it not to impose the death sentence.

The judge a quo dealt with the question of whether or not there were extenuating circumstances present in the case of the appellants in a most perfunctory manner and would not appear to have applied his mind to this part of the trial in the required manner. It would appear that the defending counsel in the court a quo, who appeared for both accused, on the conviction of the accused in his address to the court on the existence or otherwise of extenuating circumstances said that he was unable to find extenuating circumstance in the case. Counsel for the Crown submitted that because of the nature of crime he agreed with the Defence Counsel that there were no extenuating circumstances.

The judge a quo then gave the following ruling on the existence of extenuating circumstances:

"After convicting the accused of murder on count 1 and attempted murder on count 2. I have been addressed by both Mr. Lukhele and Mr. Nsibandze on the question of extenuating circumstance, Mr. Lukhele in his submission stated that he is unable in the circumstances of this case to submit that extenuating circumstances exist. It is trite law that the onus of showing on the balance of probabilities the existence of extenuating circumstances rests

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with the accused. Mr. Nsibandze for the Crown submits that no extenuating circumstances had been shown in this case. I agree with the submissions of both Counsel. This was a calculated and cold-blooded murder of the Shiba family. In the circumstances my ruling is that no extenuating circumstances have been shown in this case."

It is clear from the above that the learned judge did not apply his mind to the question as to whether or not there were extenuating circumstances in respect of either of the appellants and merely accepted the submissions of the counsel. I believe that the learned judge misdirected himself in this attitude, because there is a duty on a presiding judge in this important phase of the trial having convicted the accused of murder to consider all the evidence both of the Crown and the accused in addition to evidence given in mitigation to assess whether on such evidence on the probabilities that there are factors which mitigate the moral blameworthiness to an extent justifying his finding extenuating circumstances relieving him of the duty to impose the death sentence.

The judge a quo misdirected himself as above and it is open to this Court on appeal, therefore, to consider whether the evidence as a whole discloses such factors as would have entitled the court a quo to find extenuating circumstances justifying a punishment less than the death penalty. If the court is of the opinion that such factors exist, the correct practice would be to refer the matter back to the court a quo to reconsider the position in the light thereof. The practice has developed however, as a result of the desire not to keep the accused in suspense unnecessarily, for an Appeal Court, if it finds such factors do exist, to impose what it

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considers to be a proper sentence.

It appears from the confessions of both the appellants that Benjamin Twala, who was acquitted at the end of the trial, was the leading figure in the raid upon the huts of the Shiba family to avenge the death of his cattle which had been struck by lightning and which he for reasons, justified or unjustified, attributed to Elijah Shiba. It is ironic perhaps that Elijah Shiba, who was the main target of the attack, was not killed when the huts were stormed and burnt and that only innocent members of his family were killed. Although it might not have been established beyond a reasonable doubt that Benjamin Twala was the leading figure in and instigator of the assault on the Shiba family, the probabilities, and this is what is to be considered at this stage, are overwhelming in favour of this having been the position. Extenuating circumstances have to be established only on a balance of probabilities and not beyond a reasonable doubt. It is clear further that this attack on the Shiba family was dictated largely if not wholly by a belief in witchcraft and by a belief that the loss of cattle had been caused by Elijah Shiba who had caused the lightning to strike and kill the cattle.

This appears clearly from the confessions of the two accused and is borne out by certain of the witnesses of the Crown. The judge a quo, as set out above, relied on the confessions to convict the two accused, but failed as he was obliged to do to examine the confessions which were admissible evidence to see whether there were any facts favourable to the accused which could justify a finding of extenuating circumstances.

I set out in brief facts appearing in the confessions of the two accused which set out the role played by each accused in the assault on the Shiba family.

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Accused No.2 in his confession, inter alia, stated the following;

"Ben Twala arrived at my home on Christmas eve.

When he arrived I was not at home but when I came back I found him already there. I greeted him and asked as to what his mission was about. He explained that he had come to ask me to come to his home to perform certain rituals since I am an Inyanga. I told him that he had come at the wrong time as it was the Christmas season. He told me that he was at great pain since one Elijah Shiba had killed thirteen (13) head of his cattle with lightning. He said he greatly wanted to go to Elijah Shiba's kraal after I had cleansed him.

I then prepared my medicine and we later left in his van to his home. After having passed Pigg's Peak the van broke down. He left me in the van and proceeded to look for a motor mechanic in Pigg's Peak. He came back with the motor mechanic who failed to fix the motor vehicle. He then left again. He came back with his own mechanic, with whom he stays at Ekupheleni. The name of his mechanic is Ndwandwe. They arrived at about midnight. Ndwandwe fixed the motor vehicle and we proceeded to Twala's kraal at Ekupheleni. Twala was now driving Ndwandwe's motor vehicle and Ndwandwe Twala's in which I was a passenger. We did not do anything since it was already in the morning when we arrived at Twala's kraal.

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He showed me a room in his home where I slept. There was a girl in the room when we arrived but Twala ordered her to leave that particular room. I slept alone.

When I woke up I found that everybody was up and moving up and down in his homestead. I was served with some tea by the girl we had found in the room. After I had finished my tea Twala entered the room in the company of his mechanic. Ndwandwe. Twala told me that since it was after sunrise I was to do my job in the evening of the same day, I left with Ndwandwe to take me to the homestead of one Magagula who owed me a goat. Magagula promised to send his wife to bring the goat at my homestead. We went back

to Twala's kraal. I spent the whole day at Twala's kraal.

After sunset I slept on a sofa in the room Twala had given me. During the night Twala entered the room in the company of Ndwandwe. He told me that it was no time to sleep since he had called me to some work. Now it was time to work. I asked him as to what he was going to pay to me if he should succeed in his work. I demanded ten head of cattle. He said he had no herd of cattle since they had been killed. I then told him that I wanted E300.00. He did not give me the money. The three of us left his homestead in the direction of Elijah Shiba's kraal.

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Twala produced two guns from his butchery before we left his kraal. One was a shortgun and the other a ,303 rifle. He also took a ± 20 litre container full of petrol and an empty small tin container.

At the time we left the room Twala was putting on black clothes. He was putting on a hat that sort of covered part of his face. He had painted his face white. I was putting on a cooler hat. Ndwandwe was wearing a black overall and a cooper hat. When we were about to get out of Twala's fence, I had given some muti and instructed him to take some into his mouth and spit (akhive) to the East, West, South and North. I instructed Ndwandwe to do the same. They did that. I made him do that so that Elijah Shiba should not wake up upon Twala's arrival there since Elijah Shiba has got sons who if they could wake up they could kill Twala. The muti is called (Sindiyandiya, Ndodemnyama and ingobamlomo). We then went through the fence. Twala was carrying the short gun and Ndwandwe the ,303 rifle. Twala was also carrying the small tin and a torch. They were helping each other carrying the petrol.

We arrived at Elijah Shiba's kraal. Twala showed us the house in which Elijah Shiba sleeps. The house was facing the west. I stood next to a tree in Elijah Shiba's kraal. I performed some rituals to make the people in the homestead to be

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fast asleep.

Twala kicked the door to the house. It got open. He entered and kicked two other doors apparently leading to rooms in the house. Nobody appeared. I was still performing rituals to make them sleep. Twala took the tin and drew some petrol from the container. He splashed the petrol into the rooms three times, each time drawing from the big container. Seeing that there was no response from the house he took the short gun and fired into the rooms three times. At that time Ndwandwe was standing on guard just outside the house with the ,303 rifle so that if anyone should come out he would shoot him.

Somebody shouted from inside the house saying that Elijah was not in the house but in a grass thatched house at the back of the homestead. It was a male voice. At that time Twala lit a match stick and threw it in the house. There were bangs as the fire engulfed the whole house. I still heard the shouting voice from the burning house, Twala turned to another house nereby. He splashed it with petrol and lit it. A woman emerged from the second house. She ran straight to where I was standing shouting as to what was happening. She suddenly turned, entered the house from where she had come and came out with a small child. I then shouted to Twala asking him if he had come to kill everybody in the homestead since it was clear that Elijah Shiba was not there. I told him that he was doing wrong by setting the other house on fire since not even a single person had

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managed to come out of the first house. I said this because I felt for the people inside the houses. I told him that he was doing wrong and suggested that we must leave the housestead.

We then left Elijah Shiba's homestead. I believe that he left the plastic container because I did not see it along the way back to his kraal. We arrived at Twala's kraal. He loaded the two guns on his van and told

me that since my work had been done I must go away. We then left, the two of us in his van. When we were near Ngwenya he spotted a police van driving in the opposite direction. I never saw Ndwandwe shoot at anybody at Elijah Shiba's kraal.

Twala drove in the direction of Piggs Peak and we were driving at a high speed. When we were near Motjane he told me that he was going to throw away the van with the guns so that he could tell the police that his van has been stolen.

He drove off the main road before sunrise. We left the van near a certain mountain. He took the guns and hid them separately from the motor vehicle around the same mountain. We went back to join the main road where we had branched off."

Elijah Shiba in his evidence stated that he saw three males wearing balaclava hats at his huts. They took a twenty litre petrol container near William's house and placed it near the door of the grass-thatched house and they started sprinkling it with petrol which was set alight. This evidence which was accepted by the judge a quo casts a doubt on part of the above facts stated in the confession but it does not detract from the secondary or subordinate

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role which accused NO.2 played in the attack.

Accused No.3 in his confession, inter alia, stated the following:

"I am employed as a motor mechanic by one Ben Twala At Magagula's kraal we were offered some food since it was Christmas day. I also bought a bottle of beer and drank it. Kunene did not drink the beer since he said he stopped drinking beers a long time ago. I went back to Twala's kraal with Mr. Kunene. I parked the motor vehicle and we sat just next to it. There was some liquor at Twala's kraal. So, I continued with my drinking. Twala came back during the day although I did not know what time. After sunset I went to Kunene. He had some bottles of beers and soft drinks next to him. He was drinking some gin and wine. I asked him why he was drinking yet he had said he left drinking. He said he wanted to gain courage. I left him and continued with my drinking where I had been drinking. I went to him again and found him sitting with Twala. We extended some greetings with Twala and Twala then told me that he does not approve of my drinking He then informed me that we were going to attack Shiba's kraal since Shiba had killed his cattle.

Since I was putting on an overall only I decided to go and fetch my poloneck jersey. When I came back I found that they were ready to go. Twala gave me a twenty litre plastic container. It had petrol inside. Kunene took his medicine bag and I carried one gun and Twala the other. Since the plastic container was heavy we took turns in carrying it..... Twala went to the first

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hut and started knocking on the door again. He ordered us to start splashing petrol on the last house. We did that with Kunene..... We splashed that house with petrol and Twala took the tin and splashed right inside the house through the door since it was open. I threw away the plastic container and ran away. When I was a distance I saw the whole homestead on fire. I ran into the bush and proceeded to my kraal. I slept without having seen the two of them."

It appears from the above that accused No.2's involvement in the commission of the offence was secondary and that the main participant was Twala. It is clear, further, that the appellant's belief in witchcraft played a major role in his involvement in the offence. It would appear, further, that at some stage accused No.2 called upon Twala to stop his firing the houses as Elijah Shiba was not in any of the huts. It would appear, further that accused No.2 accompanied Twala for the purpose of using his witchcraft so that the Shiba family could be put to sleep so that Twala could carry out his acts of revenge. It does not follow that he knew precisely, what form this was to take and that he went there with the

premeditated purpose of committing murder. It was suggested in argument on behalf of the Crown that a belief in witchcraft is not always a mitigating circumstance and it was contended that it should be confined to certain limits where it caused retaliation for acts of witchcraft performed on the person involved. I am of the view that belief in witchcraft can in certain circumstances be a mitigating circumstance and in certain circumstances an aggravating circumstance depending on the facts of the particular case and it would be wrong to attempt to define situations in which it is a mitigating or aggravating circumstance. It will be for the

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court in all cases to consider all the facts and in the light of such facts to come to a conclusion.

The lack of pre-meditation applies also in the case of accused No.3. It was Christmas day and it is clear from his confession that he had been drinking heavily and that this in all probability weakened his will power and resistance to the orders and influence of his employer Twala. All the above factors must be considered cumulatively and I am of the opinion that the cumulative effect is to reduce the moral blameworthiness of both accused 2 and 3.

Although different factors might have influenced accused 2 and accused 3, in my view, there is no or little difference in the moral blameworthiness of accused 2 and 3 in their participation in the offences charged.

I would therefore hold and find that the evidence as a whole in the court a quo establishes extenuating circumstances surrounding the participation by accused 2 and 3 in count 1 in which the death of several persons were caused and that a sentence less than the death sentence is justified. This is a serious case in which the murder of several persons were caused and a severe sentence must be imposed. Regard must be had however to the cumulative effect of the sentence to be imposed on count 1 to that which has been imposed on count 2.

I would therefore allow the appeals against the sentences count 1 and impost a sentence of 12 years imprisonment on each of the accused 2 and 3 to commence to run from the 10th July, 1987. The charge on count 2 although part of the same action on the same night relates to different persons and I would order that the sentence of 4 years imposed on this count is to run consecutively after the sentence on count 1 had been served.

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I would therefore dismiss the appeal against the convictions and order that accused 2 and 3 be sentenced to 12 years imprisonment on count 1 to run from the 10th July, 1987 and the sentence of 4 years imposed on count 2 to run consecutively and be served after the completion of the sentence on count 1.

MELAMET, J.P.

I agree.

WELSH, J.A.

I agree.

LEON, J.A.