

IN THE HIGH COURT OF SWAZILAND

CRIM. CASE NO. 82/96

In the matter between

THE KING

VS

1. SAMKELO STANLEY HAGAGULA

2. SANDILE BRUTAS MAGAGULA

CORAM : DUNN J.

FOR THE CROWN : MR. D. WACHIRA

FOR THE ACCUSED : MR. Z. MAGAGULA

JUDGMENT

28TH OCTOBER, 1997

The two accused who are brothers, are jointly charged in an indictment of three counts.

On count one, they are charged with the murder of their uncle Joseph Ndlokokwakhe Magagula at Mahwanceni area, on the 9th September 1995.

On count two they are charged with assault with intent to murder Linah Magagula, the wife of the deceased on count one, also at Mahwanceni area on the 9th September 1995.

On count three the accused are charged with arson arising from the setting on fire of a house belonging to the deceased on count one at Mahwanceni area on the 9th September 1995.

2

The accused pleaded not guilty to three Magagula related the events of the evening of the 9th September as follows –

Linah and her husband, the deceased, retired to bed at about 8.00 pm. At about 10.00 pm Linah awoke and detected a strong smell of petrol in the house. She woke up the deceased and they both raised an alarm. Shortly thereafter they realised that the thatched roof of their house was on fire.

Linah opened the door and ran out of the house. Outside the house, she saw accused No.1 standing to her right hand side. Accused No.1 immediately advanced on her, with a spear in his hand. He stabbed her twice on the back of the left shoulder. At that stage Linah saw the deceased falling outside the house, a short distance from where she had been attacked by accused No.1. Accused No.1 then left her and ran towards where the deceased had fallen. Linah's daughter Sithembile Magagula (PW4) who occupied one of the huts at the homestead came to Linah's assistance and carried her out of the homestead. Linah was returned to the homestead after the arrival of her neighbours in response to the alarm that had been raised. She found her husband lying dead next to one of the houses that was still under construction. Linah was taken to the Nhlanguano Hospital in the

early hours of Sunday 10th September 1995. According to Linah , she was in severe pain from the stabbing and burns she had sustained when she fell into a fire which had been started in front of their house. She stated that she was only able to make a report to the police on Monday 11th September.

She Stated that she informed the police on that day, that she had been attacked by accused No.1.

3

It was Linah's evidence that she knew accused No.1 very well as he was the deceased's nephew and had grown up in her neighbourhood. She stated that there was a full moon on the night in question and that the burning hut also gave out light through to which she clearly saw accused No.1.

According, to Linah, she also identified accused No.1 by his dreadlocks.

On the question of the relationship between the deceased and the accused's family, Linah stated that accused No.1's father had exchanged a goat for a bigger one with the deceased for purposes of feeding mourners at the funeral of accused No.1's daughter. Some misunderstanding then arose between the two families when the deceased's goat had to be replaced. According to Linah this resulted in accused No.1 not talking to the deceased whenever they met.

According to Dr Reddy, the police pathologist (PW7), the deceased died as a result of multiple penetrating injuries. The injuries extended over the Trunk, lungs, ribs, intercostal structures and the heart. There was a fracture of the skull and a laceration of the frontal region of the brain, with intracranial haemorrhage. The injuries are set out in detail as pages 2 and 5 of the post-mortem report (exhibit D).

The medical report in respect of Linah was handed in by consent as exhibit E. According to the report Linah was admitted on the 10th September 1995. She was treated for multiple injuries and burns and was discharged on the 17th

4

October 1995.

Sethombile told the court that she woke up when she heard her mother raising an alarm at about 10.00 pm. She peeped through the window and saw her parents' house on fire. She got out of the house she was in and saw her mother coming out of her house. She stated that she then saw accused No.1 stabbing her mother with a spear. Her mother fell down and at that time she saw her father coming out of the house. He too was attacked and stabbed with a spear by accused No.1. It was Sithembile's evidence that she picked up her mother and placed her near the gate to the homestead. She (Sithembile) returned to the homestead and met accused No.1 who started chasing her. She managed to outrun him. She was later chased by accused No. 2 before returning to the homestead and seeing both the accused stabbing the deceased with spears next to the house that was under construction.

It was Sithembile's evidence that she informed the police that the two accused were her parent's assailants, at about 8 .00 am on Sunday 10th. September. Sithembile confirmed that there was a full moon on the night in question and that the added light from the burning house enabled her to clearly identify the two accused who are her cousins, as the attackers.

Both Linah and Sithembile remained unshaken under cross-examination as to their respective identification of the accused at the relevant time. Both these witnesses further denied the suggestion that the police had suggested

to them, who the assailants were. Sithembile confirmed under cross-examination that accused No.2 was amongst the neighbours who turned up at the homestead after the attack on her parents.

1305 detective sergeant Mtetwa of the murder and robbery-squad reported to the Nhlngano hospital and interviewed Linah on the Monday. It was his evidence that she informed him of the attack and reported that she had identified accused No.1 in the course of the attack. According to Mtetwa it was as a result of this information that constable Danger Dlamini was detailed to arrest accused No.1 on Monday 11th September. 891 Detective Sub. Inspector Shabangu was also present at the arrest of accused No.1. According to these two officers accused No.1 was arrested at his homestead. Accused No.1 was cautioned in terms of the Judges Rules and he""denied all knowledge of the commission of the offence. On the 14th September, accused No.1 mentioned his brother accused No.2, who the police arrested on the 15th September.

On the 16th September the officers Dlamini, Shabangu and Mtetwa were taken by the two accused to a field near the accused's homestead where accused No.2 produced a spear. From the fields the accused took the police to accused No.1's home. Accused No. 2 pointed to a spot in the yard where a balaclava was recovered. Accused No.2 later produced a pinafore and a two piece overall some distance from accused's No.1 homestead- A bush-knife belonging to Johannes Kunene (PW5) and which Kunene had lent to accused

no.1 was also recovered by the police.

The recovery of the items. I have referred to did not result in the introduction or discovery of any factor further linking the accused with the -commission of the offences charged. Linah and her daughter were not in a position to identify any of these items as items they had seen on the night in question.

Thembi Ntshalintshali (PW4) a petrol attendant at Vulindlela Filling Station told the court that accused No.1 purchased 5 litres of petrol from her on Tuesday 5th September 1995. She stated that accused No.1 later came to the filling Station in the company of the police. She was able to identify him by his dreadlocks. She stated that accused No.1 confirmed in front of the police that he had indeed purchased petrol from her.

The crown also led the evidence of a Magistrate, Mr Magagula (PW3) regarding statements which he recorded from the two accused. When the magistrate was called I enquired from the attorney representing the accused, if the admissibility of the statements was in issue. Mr Magagula stated that the defence had no problem with the admission of the two statements. He pointed out that the defence contention was that the statements as recorded did not amount to confessions i.e. ran unequivocal acknowledgement of the accused's guilt. On that basis, the magistrate proceeded not only to give evidence of the preliminary questions which he put to the two accused but also to read into court the

actual statements given by the accused. According to the magistrate, the accused were each cautioned regarding the making of the statements and the use to which the statement could be put.

The accused did not complain of any ill-treatment or any undue influence on the part of the police to induce them to have the statements recorded before the magistrate. Mr Magagula did not cross-examine the magistrate or challenge any of the evidence he gave.

The magistrate gave his evidence before the investigating officers Danger Dlamini (PW8); Shabangu (PW9) and Mtetwa (PW10). When these officers gave evidence it was put to them by the defence that they had assaulted the accused in the course of the investigation. The officers denied this suggestion.

The accused each gave evidence on oath. In their evidence, the accused each gave details as to how they were assaulted in connection with the recovery of some of the exhibits and for purposes of forcing them to go before the magistrate. "Accused No.1 stated that he would not have gone before the magistrate had he not been threatened and assaulted. It was his evidence that he was taught the story he subsequently told the magistrate in the course of the interrogation. Accused No.2 described how a tube was tied around his face causing him to suffocate. This he stated was done to force him to confess to the murder of the deceased. He stated that he was instructed by the police not to reveal the assaults and torture to the magistrate.

8

It became necessary that the Crown be given the opportunity of calling the rest of the police investigation team to deal with the allegations of assault and torture which the accused stated had induced them to make the statements to the magistrate. The officers were 1197 detective sergeant Ntshangase and 1250 constable Wilson Dlamini. These officers also denied the allegations of assault and torture.

The procedure to be followed, in Swaziland, in determining the admissibility of a confession by an accused to a judicial officer was first set out by Nathan C.J. in the case of R.v MKALIPHI AND OTHERS 1977 - 1978 SLR 191. .The learned Chief Justice laid down in that case that it was for the crown in the first instance to establish, through the judicial officer, prima facie, that there was no improper or undue influence brought to bear upon the accused and that the Judicial Officer asked the necessary questions to that effect- The accused could then give evidence of the matters of which he complains and to name where possible the persons responsible for the matters complained of.

The crown would then be given an opportunity to lead evidence in rebuttal. It is clear from this judgement that the onus of establishing that the confession was made freely and voluntarily remains throughout, on the crown.

In the later case of MAGUNGWANE SHONGWE & OTHERS 1982 – 1986

II SLR 427 Hannah C.J. considered the position and held that it was for the crown to begin and to establish that the confession was made freely and voluntarily. The prosecution

9

in that case had contended, without reference to MKHALIPHI'S

case supra that the usual practice was for the accused to give evidence first so as to lay the foundation for any objection to the admissibility of the confession. In dealing with this contention, the learned Chief Justice stated at 427F - 428b –

I do not know to what extent this procedure has been followed by the courts of this country in the past but it is certainly alien to the courts of England and my understanding is that it is not the normal practice followed by the courts of South Africa. On one view it is merely a matter of convenience which side should give evidence first on a *voire dire* and the only matter of real importance is that the court should keep in mind that the onus of establishing the voluntariness of the statement remains always on the Crown. However, Oh another view to require an accused to give evidence first also

involves placing on him a burden to give evidence. I do not see why he should have that obligation placed on him. In my judgment the better course, and the course which should normally be followed, is for the prosecution to lead evidence first. It is, after all, "the prosecution which has the burden of proving that the statement was made freely and voluntarily and the accused may have no need to enter the witness box at all. Defence counsel should outline the grounds of his objection and in meat cases the details of those grounds will clearly emerge during cross—examination. It may reasonably be expected that

10

in most cases such witnesses as the prosecution may need to call will be present at court. However, to avoid the possibility of adjournments and consequent delay defence counsel should regard it as his duty to give prosecuting counsel forewarning of the general nurture of The objection to be taken in order that arrangements may be made in advance to have all necessary witnesses in attendance. It is only in exceptional circumstances that the accused should give evidence first on a voire dire.

I am with respect, in full agreement with the decision in the latter case.

In the present case, the defence allowed the contents of the statements by the accused to be presented to the court through the Magistrate. There was no indication then, of the challenge of the admissibility of the statement. Insufficient information as to the basis of the challenge and in particular as to the responsible police officers was given by the defence under cross-examination to enable the crown to rebut that evidence before the close of the crown's case. It was. only in, the course of the accused's evidence that some names were given and the crown was then given the opportunity to lead evidence in rebuttals

Given the procedure which was followed, resulting entirely from the defence, I have approached the evidence of what would have Been a trial within a trial alive to the fact

11

that the onus rests on the crown to establish that the statements were made freely voluntarily by the accused. I have considered the evidence in its totality and in the light of authoritative decisions to the effect that if it transpires at the conclusion of the evidence in a trial that a confession Which was earlier admitted as evidence in such trial was in fact improperly induced, the court may reverse its earlier decision and exclude such confession. See S. v. MKHWANAZI 1966(1) SA 736. I am satisfied that the crown has discharged the onus of proving that the statements were made freely and voluntarily by the two accused.

The statement made by accused No.1 is as follows:

During the year 1993 I was residing at Mathendele Location and on the 14th of May, 1993 my child who was eight months old died. The fact is I work in the mines in South Africa. I heard of this when I was told, When they made The telegram it did not reach me by the 14th May. I only received it on the 27th June and that was the time I came down home. And when I arrived I found that the body of the child together with the mother had been taken to my parental home. The way the child died was that the child was on the' back of the mother and they were knocked down by a car. When they were knocked down by the car they were at the bridge near the location. When I arrived I found that they had been taken home. The mother of the child did not die but only the child Tiled. In my delay in coming I found my senior paternal uncle Ndlokwakhe and when I arrived he

12

told me that he thought I had also died. And he had thought that I would come back in a coffin. I was told that the whole funeral arrangements were made by him. When I asked him how much were the expenses incurred in arranging for the funeral, he said I must not worry or bother myself because he considered that he was burying his child as I was his child. He said I must not worry except that there was a goat that my aunt or senior aunt had contributed and that I should discuss that with my senior aunt. My senior aunt did not say anything or discuss anything with me concerning that except that she said that they had agreed with my father that my father was going to give her a younger goat in the place of that one. But when I had gone back to work I then heard that my senior paternal uncle wanted everything that he had incurred as expenses in the funeral of the child. But when I arrived I found that the people who were involved in the accident when my child died had arrived. When they came they brought E100.00 and also some cabbages and other food stuffs. The E100.00 was given to my senior paternal uncle together with the money to pay for the goat which was a E150.00. They gave him the money because he had said he no longer wanted a goat but instead he should be given money because his' children had been expelled from school. During the month of June 1994 I then left the location and went to build a home in my area. Since 1994 I was at home and my senior paternal uncle did not like that but I did not build my house at my parental home, instead I was given a piece of land where I built my own home which was a distance

13

of about 2.5 kilometres from the main home. My uncle then did not want me to talk to him since that time. Even during the time when I was constructing my home, my uncle would pass by and would fail to even greet us. I did try some other time when I met him along the way to greet him but he asked me if I thought my fathers were like him, he also asked me if I did not know my fathers and that was the time when I realised that my uncle did not like me. He had been given the money for the goat but I then heard that he wanted four goats and he was not discussing that with me but with my father. My father asked him as to what goats then did he want because he had been given money.

I later heard that he had laid a charge against me at Mashobeni. I heard that when my father called me and informed me that the following day we would be going to Mashobeni for the case. When I asked my father what case it was, he said that charge was laid against me by my uncle. When my father called me it was at about 8.00 a.m. in the morning and it was a Saturday. In the afternoon that day my father then sent a child to inform me that we would no longer be going to Mashobeni since there has been a death at a Magagula family at Magubheleni. My father said that after he had seen my uncle going to the funeral and that is how the case was stopped. . On the 2nd of September there was some function or ceremony at home. A certain woman came and she is an aunt to me and her name is Melinah. She is a neighbour to my uncle. She said she wanted to see me

14

even If it was on a 'Sunday but she said it must be soon, but that did not happen, I only saw her on a Monday. She told me that there was a story that she wanted to tell me however, she was in a hurry on that Monday because she was going to a funeral. Before I even met her another aunt of mine, Rejoice, arrived in the morning. She arrived on a Tuesday at about 5:40 a.m. in the morning and I was in my house. She called me together with my wife and said we should go to the kitchen since there was something that she wanted to tell me. When she. started talking she said that I should be careful because she had heard that they wanted to kill me. When I asked her as to who that was, that wanted to kill me and she said that was my uncle. I asked her as to why my uncle wanted to kill me and she said that it was for his four goats and if my father did not pay back those goats I was going to die. I came back from Johannesburg on the 19th August. There is one cow that I bought. He then said that my father was proud of me since I had bought the cow although I was not paying back his four goats.

He said in that way the cow was going to be used for food during my funeral and on that Saturday of

the function he wanted me and he did not find me on that day because he was not present in the function together with his or all his children. On that same Tuesday after I had talked to my aunt I then went to my father and informed him about it. I asked him if he had heard about such story, that I was supposed to be killed. My father said he had heard about it and that on the morning a certain person had

15

come and informed him. I asked my father as to what then did I have to do since he had also heard about the story. My father said that he did not know - I would have to see to it "myself what I have to do. I then left and went back to my home where I was staying. At 3.00 pm I, then took my 5 litre container and put it in a bag and then left. Whilst I was on my way I met my aunt who is called Melinah and she said that I must go via her place but I told her that I was in a hurry and I would see her some other time. But she said there was just a small thing she wanted to tell me about. I then went via her place. When I got to her place she told me that I was supposed to go mad and since I did not, go mad then I was supposed to be killed. She went on to say that my aunt had also sworn that if I came back home . I would be very lucky. And she had said that if I did not die then I would be crippled. I thanked my aunt and then left and told her that I did not know what I would do with such a matter. I then went to Gege ,and bought 5 litres of petrol and then went back home. On Tuesday in the evening when we were preparing to sleep I heard some noise by the cooking hut as if somebody, was opening. I was afraid to go out and see because I had been informed that I should never go. out after sunset. I did not go out of the house on Wednesday, Thursday and Friday and then I thought as to how long was I going to remain in the house. On Saturday at about 3,00 pm my brother Sahnile arrived and I then made a report to him about the story and we decided that we should die together and we should die going forward. On Saturday at about 10.30

16

p.m. in the evening I then took the petrol container and my brother Sandile took the grass and also a spear and I took a bush knife. We then left my home and headed towards my uncle's place, and when we got near his place (my uncle's place) we sat for some time and at about 11.00 pm we got in.

Sandile placed the grass on the entrance and I poured the petrol on it and he lit a match and set it alight. After he had set the grass alight the grass burnt and when the fire started an alarm was raised and the woman came first. We did not want her, in actual fact we wanted the man and the spear was used on the woman first. When the man came, out and tried to' run away he met me and I was carrying a bush knife. I then chopped him with the bush knife and he fell down. After he had fallen down Sandile then came with the spear and we finished him. We thereafter left and went home until the police came on a Monday and collected me. When the police took me they informed me that they had heard that there was an misunderstanding.

The statement made by accused No.2 is as follows –

It means it is us who killed the person but we did not just pounce on him, there is something that he said to me. He said people like me are dead. I then went and told my father and my father said that he was going to talk to him. But my father did not tell me if he had spoken to him. The second thing he said was that a day was coming for me

17

When I asked him why he was saying that , he did not answer me. I again told my father together with my aunt and they both said that they whet it they haf spoken to him. I then left home and went to Germiston. When I came back I found my brother and it was on a Saturday. I arrived at about 3.00

pm. He told me that my elder paternal uncle wanted to kill me. When I asked my brother why the senior paternal uncle wanted, to kill him, he said that he did not know. He said that it was because my brother was owing my senior paternal uncle four goats and he was saying that he did not know any thing about those goats. And he said that when he paid back a goat after the death of his child the uncle refused to accept it. The uncle said that my brother was going to thank the uncle with whatever he wanted to thank him with because he (the uncle) considered that he was burying his own child. My brother had bought a cow and he said the cow he had bought was going to be used in his funeral, that is to accompany him. What came back into my mind is what my uncle had said that people like me had died and also that a day was coming for me. My brother said that people were saying that the uncle wanted to shoot him. And my brother said that he was told that by aunt Joyce and aunt Melinah. I found my brother having prepared to go there. He had prepared a bush knife, a spear.

19

I have serious difficulty in appreciating the submission by Mr Magagula that the statements do not amount to confessions. The reasons advanced by the accused in their statement for having killed the deceased do not amount to a defence to the charge of murder.

The two accused were properly and positively identified by Linah and her daughter Sithembile at the, time of the commission of the offences. I accept the evidence of these two witnesses as credible and reliable. It was through the report made by these two witnesses to the police that the two accused were arrested. In addition to the evidence of the identification of the accused there is the evidence of their confessions to the Magistrate. The murder, assault with intent to murder and arson have "been proved by evidence aliunde to have actually been committed.

I find both accused guilty as charged on all three counts.

B. DUNN

JUDGE