REX

v

DUMISA MARWICK DLAMINI

CRI. CASE NO. 115/96

Coram S.W. Sapire, ACJ

For Crown Mr. D.Wachira
For Defence: Mr. S. Kubheka

JUDGMENT

(24/11/97)

Dumisa Marwick Dlamini has been indicted before this Court on the charge of murder and two lesser charges relating to unlawful possession of a firearm and ammunition. In respect of the main count it is alleged that the accused is guilty of the crime of murder in that upon the 12 October 1995 and at Lubhuku in the district of Lubombo the said accused unlawfully and intentionally killed Madamu Makhanda Dlamini. I will not cite the particulars of counts 2 and 3 because of the conclusion to which I have come in regard thereto.

It was in evidence established that the person named as the deceased in the charge sheet died at his home on the 12th of October 1995 as a result of a .38 bullet wounds of which they were 3 in his head. The deceased, a man in his seventies was the accused's grandfather. The fateful assault took place, significantly, immediately before the funeral of the deceased son who was the accused father. These facts became common cause although the defence withheld some of the confessions ultimately made until the comparatively late stage of the trial. The reason for this is not immediately apparent. The trial was protracted through it being necessary to prove matters which as I say were ultimately considered.

The death of the deceased was reported to the Police immediately in October but for some reason or another the investigations took place at a leisurely pace so that it was not until Friday the 1st of December that a sworn statement was obtained from Makoti Dlamini the accused's sister and until the 5th of December that a further statement was

obtained from Mnyundzile Tshabedze the accused's mother.

The accused person who was employed at a mine in Klerksdorp in the Republic of South Africa, had at the time of the death of the deceased come to Swaziland to attend the funeral of his late father. He returned to Klerksdorp once he had performed his funeral duties in this respect.

The statements which the Police obtained from the accused mother and sister raised a strong suspicion that the accused may have been involved in the shooting of the deceased. Acting apparently on this information Inspector Ndlangamandla accompanied by other Police Officers journeyed to Klerksdorp to meet with the accused. They first approached the accused's employers and asked for permission to see him. The accused was brought into their presence. The police informed those persons who were gathered there, of their purpose in coming to Klerksdorp. They requested from the accused that he return with them to Swaziland to assist them in the investigation of the case and they asked the employer for permission for him to accompany them.

Clearly the Swaziland Police had no authority to make an arrest in South African territory. They insist that they did not do so. According to Ndlangamandla the arrest was not ultimately made until the accused was lodged at the Police Station at Siphofaneni. The accused maintains that he did not go entirely voluntarily and insists that he was manacled in Klerksdorp and that he remained so manacled until shortly before the border posts, through which he was taken. Thereafter he said, he was again manacled after passing through the border post and taken to Siphofaneni in handcuffs. Inspector Ndlangamandla says that he spoke to the accused after their arrival at Siphofaneni and that the accused was then, as he had been all the time cooperative. He says that after the accused had been warned in the required customary manner, the accused then made an oral statement to him. The nature of the statement was such that Ndlangamandla considered it appropriate that he be taken to a magistrate, in order for the statement to be confirmed so that it would be admissible as evidence. No Magistrate was immediately available so that the accused was kept in custody at the Police cells at Siphofaneni overnight.

The following day he made a written statement, which was recorded by a police officer. This statement, because of its content and because of the person to whom it was made, is inadmissible in terms of Section 226 of the Criminal Evidence and Procedure Act.

On the same day, the 8th of December the accused went in the company of some Police Officers to the dwelling which is known as the parental home of the accused. At a point some short distance from the huts comprising the homestead the accused exhumed a firearm and ammunition. These items feature as exhibits before the Court. There is some dispute as to the exact circumstances of the pointing out of the firearm. I use the words "pointing out" to indicate to indicate the situation where an accused person leads the investigating officer or team to a place where an item of evidentiary significance is produced The accused maintains that he did not lead the Police to his parental home but was taken there under constraint. He also maintains that when he was there he was directed to dig at a particular spot pointed out to him by Ndlangamandla. There it was that from the shallow hole, a plastic bag containing arms and ammunition was extracted.

The accused maintained that there was no sign of recent digging at that spot before he came there, but said the soil was soft enough for him to dig with his hands. It is clear however that the Police did not conceal that firearm at that spot on 8th of December and when one bears in mind that the accused's mother and the accused's sister only made their statements to the Police early in December there is no evidence to suggest that the Police visited that spot anytime after the statements were made, in order to conceal or inter the fire arm and ammunition at a spot which they would later force the accused to point out.

On the evidence available it is difficult to see how Ndlangamandla could have pointed out a spot, which he divined as a place where a gun and ammunition would be found. I accept that the accused did in fact point out these exhibits in the manner described by the Police witnesses. The question is what inference can be drawn from this pointing out. This is a matter to which I will avert later.

This took place after the accused had made the inadmissible statement to the Police on the 8th of December. It was not however until the 11th of December 1995 that the accused was brought before a Magistrate Mr. Sibanyoni. After Sibanyoni, according to him, had informed the accused that he was a judicial officer and that he the accused was not obliged to say anything unless he wished to do so he further informed him that whatever he said would be recorded in writing and might be used in evidence at his trial. The Magistrate also told him that he had nothing to fear and that he could speak openly and with complete frankness.

I did not understand the accused to dispute that the Magistrate acted in the manner he described but he does point out that on the 7th and again on the 8th he had been assaulted at the Police Station and that both his oral statement to Ndlangamandla and the written statement which was recorded at his dictation were the result of torture involving the use of "the tube". "The tube" is spoken of in many cases where torture by the police is alleged. The words have become a common description of the form of torture applied where an accused person alleges that a statement made by him was forced from him by duress. It indicates that a plastic or rubber device was used to prevent or inhibit the victim's breathing This of course is no indication as to whether the torture in fact took place or not.

Because the accused alleged or maintained that the statement made to the Magistrate was the result of the threats made and assaults heaped upon him in the Police Station it was necessary to hold a *voir dire* which is more often known as a trial within a trial. The purpose of the trial within a trial was to test the admissibility of a statement made to the Magistrate.

In Section 226 of the Criminal Procedure and Evidence Act a distinction is made between an incriminating statement made to a policeman and a confession made to any person other than a policeman. Section 226 (1) provides that any confession of the commission of any offence shall, if such a confession is proved by competent evidence to have been made by any person accused of such offence whether before or after his apprehension or whether on a judicial examination or after commitment and whether reduced to writing or not be admissible in evidence against that person. The first proviso which applies in this case, (for it was not the statement to the police, confirmed by the

accused before the magistrate, but a second statement made to the magistrate himself, which it was sought to be proved) requires that it be proved to have been freely and voluntarily made by such a person in his sound and sober senses and without having been unduly influenced thereto.

There is a further provision that if such confession is shown to have been made to a Policeman it shall not be admissible in evidence under this section unless it was confirmed and reduced to writing in the presence of a Magistrate or any Justice who is not a Police Officer.

What the crown sought to introduce was not the confession, (if such it was) made on the 8th at the Police Station. What the prosecution sought to introduce was the statement made to Mr. Sibanyoni the Magistrate in the circumstances which I examined at the time of the *voir dire.* This statement may or may not have been a repetition of the statement made to the police and recorded at the police station. It was not a confirmation of what was said to the police, because no reference was made to the contents of the statement to the police.

. The circumstances which I examined were the recounted both by police officers and by the accused. The police officers maintained that the accused person accompanied them voluntarily from his place of work to his flat, from where his travel document/passport was taken and that they proceeded from there to Swaziland without the accused having been arrested or manacled. The accused maintained that he was not a willing party to the journey and that he had been manacled and in fact arrested in Klerksdorp.

Of course that is the word of the Police against the word of the accused but an additional fact enters here and that is that the accused sought and obtained a postponement of the matter in order to produce witnesses to support his case and contradict that of the Police. The outcome of this was that the witnesses called by the accused did not support the accused's case but confirmed that of the prosecution. The enquiry had to proceed on the basis that the accused's version was not only unsupported but also contradicted. Another important factor in the…was whether or not the accused had been assaulted at the Police Station and so induced to make a statement to the Magistrate largely repeating what he had already said at the Police Station. Once again we have a direct conflict between what the accused said and what the Police said. In Swaziland the crown does not enjoy the advantage which has been introduced into the South African Act by a change in the onus. In the South African Act experience has shown that it is sometimes more often than not difficult to discharge the onus of proving beyond reasonable doubt a negative that the accused was not assaulted. This is an aspect of the Criminal Procedure and Evidence Act Swaziland, which requires, like many other Sections, urgent attention and I hope these words will not fall on deaf ears. As things stand today I had to approach this question on the basis of whether or not the crown has proved beyond reasonable doubt that the statement made to the Magistrate was made freely and voluntarily and without the accused being unduly influenced thereto. There is of course authority that a mere adherence to a…is not a guarantee that the Magistrate would have adequately investigated whether the person before him is making the statement freely and

voluntarily. I at the time examined closely what the Magistrate said had happened between him and the accused and compared this with the evidence, which the accused later gave in determining whether or not the provisions of the Section had been fulfilled. In this connection I had in mind the words quoted in Rex v Ntoyana and Another 1958(2) SA 562 where it was said by the Presiding Judge "The real check whether the provisions of Section 4244 have been fulfilled should be made by the Judicial Officer before whom the accused appears to make his confession. It must be carefully explained to the accused person especially when he is an illiterate that he is in the presence of a Magistrate or Justice who has no connection with the Police and that he has nothing to fear and can speak freely. He should be questioned whether he has made any similar statement before and why he wishes to make his present statement. He should be told that there is no obligation for him to make any statement at all and if he does that it would be used in evidence and he should be specifically asked whether he has been assaulted or threatened to induce him to make a statement or been advised to make a statement or whether any promise or inducement has been made to him". It is recognized that a mere mechanical putting of questions which appear in a form and the near automatic noting of the answers thereto is not in accordance with what is really required. Mere reliance upon and completion of a roneo form which contains a number of questions which are put to the accused person and upon which his answers are recorded is not in principal a good way of showing that all the requirements of the law are complied. Because it was suggested that it might turn to prevent the Magistrate from asking any other questions and case suggested that there should be no slavish adherence to the suggested questions. I therefore turn to examine what the Magistrate says. In view of the fact that the Magistrate did have a roneo form but the questions which are contained in the form are extensive and calculated to probe whether in fact any prior assault or inducement had taken place. After the opening information given to the accused the Magistrate then asked him the following questions and the replies thereto were recorded.

What is the purpose of your visit to me?

And the Accused is said to have said: I want to disclose my secret to you and explain what happened.

That is an answer, which one would not expect from a person who has come merely to repeat what has been put in his mouth. Without placing too much emphasis on this it seems to me that this discloses a real desire on the part of the accused to make a clean breast of what had happened. It is also consistent with the accused having returned to Swaziland with the Police to bring an end to this case.

Who told you that you could come to me?

> And he replies: "A Dlamini Police Officer."

And he said, what was said to you?

He said I must come and make a statement to someone not a Police Officer and explain

how I committed this offence.

The accused maintains when he gave evidence that he actually told the Judicial Officer that he had come merely to say what the Police had got into his mouth. This answer is not consistent.

He then asked, when were you arrested?

He said at 5.45 a.m. at Klerksdorp in the Republic of South Africa.

Obviously the accused may have thought he was then arrested when he agreed to come back with the Police. I do not think that answer takes the matter any further. The accused's account of what took place in Klerksdorp, as has been seen had to be rejected for it was contradicted not only by the police officers concerned, but by the witnesses called by the accused himself. .

For how long have you been in custody?

Since the 7th of December.

Where have you been kept in custody?

He replies: “At Siteki Police Station, and spent one day at Siphofaneni Police Station.”

This of course is factual.

Was there any promise made to you to induce you to make this statement to if and me so what was said to you?

His reply was “No promise was made to me”.

This answer is in direct conflict with what he said in evidence at a later stage because the accused maintained that not only was he assaulted and threatened with death should he not repeat the statement but he was also induced by promises that the person to whom he was going to speak was going to in some way free him. It is strange that both the threat and the inducement were made, because if the threat was made there was no need for the inducement. I am satisfied that the accused was telling the truth when he answered the Magistrate that no promise had been made to him.

He was then asked, was there anything said or done to you to induce you to make this statement, if so what was said to you.

The answer was:” None”.

Were you promised, the Magistrate asked, to be released from custody if you should make the statement? If so by whom and what was said?

Again the answer is, no one promised me to be released from custody should I make this statement. Yet when the accused gave evidence, as I have pointed out, the accused suggests that he be in fact promised some inducement

In answer to a further question he distinctly denied that any threats were made to him and he also specifically denied that he was assaulted by anyone. He indicated that he had no injuries to show the Magistrate and he indicated further that he had no wounds, bruises or injuries on his body.

He was then asked, have you previously made a statement regarding this matter whether verbally or in writing to the Police? If so when and to whom?

He replied: " I have made a statement to some Police Officers at Siphofaneni. I do not know their names." In this regard it is very strange that he did not mention the name of Ndlangamandla.

He was asked whether he has previously made a statement in writing in regard to this matter to anybody else, whether verbally or in writing.

He said: " I have not made a statement to any other person save for the Police."

The Magistrate then recorded the statement made by the defendant which is attached to this form and the accused according to the Magistrate and the interpreter signed this form as he did the previous statement.

The accused denies that he signed it. This would mean that the Magistrate and the interpreter are lying conspirators in an effort to convict him unfairly for his signature does appear in the document. The Magistrate and the Interpreter said that they saw him put it there.
It was also suggested at one time that he actually told the Magistrate nothing. But I find that the accused is actually telling a lie when he said he did not sign. This lie and his original account of how he did not make a statement and that the Magistrate who got the information from a document brought to him by the Police detracts seriously from his credibility.

The statement he made, which I will not read out again, implicates him directly as the murder. He shot his grandfather. The motive for the shooting and the killing of the grandfather was his belief that the grandfather was a witch who was causing the death of members of his family and in particular his late father whom had recently died.

I admitted the statement at the end of the *voir dire*

Apart from the confession there is evidence aliunde .of the commission of the offence in that the grandfather it is common cause was in fact shot and killed at or about the time when the accused says it happened.

A lot of time was devoted thereafter to the question of the pointing out. Little however turns on this. There is no proof that the firearm, which was pointed out, was indeed the firearm, which was used to kill the old man. In the confession the accused does not say what he did with the firearm. It is not clear what inference can be drawn from the pointing of the firearm itself. For these reasons the accused could not be found guilty on the 2nd two charges as the mere pointing out in these circumstances of this case do not lead to the inference that he was in possession of the firearm on that day.

When the accused came to give evidence he did not deal with the truth or otherwise of the confession. He did not do that in chief and this in itself is support for the acceptability of the confession as adequate proof of the allegations in count 1.

The accused also called his mother and his sister who had been crown witnesses. The crown had not called them presumably because the prosecution was aware that they would not be adhering to their statements. And indeed the mother's evidence and that of the sister did not contradict the confession but they avoided those aspects of their statements, which they had previously made, which would have implicated the accused. Both of these women contradicted their statements which had been made on oath and they were obviously closing ranks with the accused to try and avoid a conviction.

In view of the contradictory nature of the evidence and the statements which were proved it would be impossible to give any weight to what they said at all. They too complained of having been induced by the Police to make their statements. It must be borne in mind that they made their statements before the Police even went to South Africa to go and fetch the accused and it seems probable that the Police went to South Africa on the strength of these statements. It is not for me in this case really to make a positive finding one way or another as to what happened in regard to those statements but one thing is certain that no weight at all as I have said can be attached to what they have said in this Court. It is a matter for the Director of Public Prosecutions to decide whether or not these two persons can be prosecuted for attempting to defeat the ends of Justice.

As it is I find that the main charge of murder has been proved beyond all reasonable doubt and that the accused is found guilty of murder as alleged. He is found not guilty on counts 2 and 3.

EXTENUATING CIRCUMSTANCES

Dumisa Dlamini, you are aware that the law requires me, if there are no extenuating circumstances found, to pass a sentence of death on you. But I have heard what you have now said this afternoon. It is true, I am sure that you are a victim of the scourge of the belief in witchcraft, which is everywhere to be found in Africa. Because whatever your belief, I accept that you have this belief but the law cannot recognise and does not recognise that objectively speaking witchcraft exists. And those people who have told you that it does and those witch doctors who pointed out witches and blamed your grandfather for the tragedies which befell your family are every much to blame and they must share the blame for the death of this man. Many people have in their histories a time when witchcraft was accepted as being true but here we are nearly in the year 2 000 the time is ripe for belief in witchcraft to depart from this world; but as I say in your case I have to consider the case from your personal point of view and from the point of view what went on in your mind.

There are decisions in this Court, which allow me to find that if you commit a murder as a result of a belief

in witchcraft that may be an extenuating circumstance. I have looked at you over the long time this trial has continued and I find that it is regrettable that it was a long time. It would have been better had you come to Court right at the beginning and said what you said you told the Magistrate. In the result I am satisfied that in your case you believed in witchcraft which induced you to shoot your grandfather. This belief is an extenuating circumstance, which operated on your mind and reduces your moral guilt. It is therefore not necessary for me to pass the death sentence.

SENTENCE

Before I pass sentence on you I want to express the Court's appreciation of how your counsel has handled this case. He was placed under difficult circumstances because you deviated from your immediate reaction when you were confronted by the Police and your counsel has presented your defence in a proper and professional manner, notwithstanding that he may have appreciated that it was not a wise course to put this matter as an issue and it would have been better for you to have come to the Court as you did to the Magistrate and made a clean breast of the whole matter.

This is a case in which the belief in witchcraft has again brought the accused to Court. For many years cases similar to yours have come to the Court and the courts have consistently tried to indicate not only to the accused persons but to the public at large that whatever belief you hold it is wrong to kill another human being and murder is the intentional killing of a human being for which normally speaking a person can be, himself, sentenced to death and executed. The Courts have however recognised the prevalence of this belief and however irrational and unfounded it may be, in the sophisticated mind nevertheless it finds its place in this society among others.

In your case like in many cases diviners cultivate this belief. There are many people who pretend that they can point out the source of disasters, which have befallen people. This particularly relates when relatives die and there is a reluctance to accept that the death has been occasioned by natural causes. In your case I have no doubt that what you have been told by diviners or what you were told had been said by diviners operated on your mind in the particularly difficult time when you returned home to find that your father had died. As I have indicated to your counsel I was somewhat disappointed that you did not, as I said, maintain the stand which you had adopted when you were confronted by the Police and came before the Magistrate eventually to bare your chest. I am not going to allow that disappointment in you to affect the length of the period of imprisonment to which I am obliged to sentence you to. My attention has been drawn to previous cases in which young people have come to the same point of view from the same belief and a pattern has emerged from the previously decided cases. Each case has been decided however on its own merits. Each accused person is different. The matters influencing him are not the same in every case but one thing, which emerges in all the cases, is that a substantial period of imprisonment has to be imposed. This is so not that you are going to get any benefit from being in jail for a longer period. I do not know whether this experience is going to affect your belief in witchcraft. I certainly hope that you will have the effect of impressing upon you that whatever your belief is you still may not take the life of another person. I cannot allow the message to go out in the country that people who kill and come and say they did it because of witchcraft, whether it is true or not, that this entitles them to a lighter sentence or that the conduct can be condoned by the Cou rt in any way. The deliberate taking of a human life remains murder. I must agree with the previous judgment in which Mr. Justice Dunn said "I consider it proper for the Courts to continue to impose sentences which will serve as a deterrent not only to the accused but to other members of the community who might be affected and allow them so to be carried away with this belief in witchcraft." Members of the community must be made to realise that this belief if taken to the extent of taking lives will not be tolerated.

In sentencing you I take into account that you are a family man, with children and other

relatives dependant on you. Having said that I still have to deprive them of your support for a considerable number of years. It is a very unfortunate result of a conviction of this nature but it is a result, which I may not avoid by passing an inadequate sentence. I take into account the unlikely circumstances of other cases. This was a relatively quick and painless death, which you inflicted on the deceased. It seems that you shot him while he was asleep and for purposes of sentence I accept that he did not suffer pain and may well not have known what happened. There were other cases in which in similar circumstances there was evidence of pressure being applied by family members on the culprit to perform the prohibited act. In your case the evidence seems to suggest that your family members, although they may have had the same belief as you, knew that it was wrong to take their beliefs to the extent of killing your unfortunate grandfather. Your mother tried to deter you by having your pistol hidden by your sister. You received no support in your intention by your brothers and your sister herself hid the firearm away in her trunk. But these things did not deter you and you broke into the trunk in order to get possession of the pistol. Your family as I said, had close ranks and ready to support you in your trial and those who made previous statements on oath have left them open to prosecution. It is quite clear that at the time they appreciated what you may do and did everything they could to prevent it. You were arrested, as we heard, on the 7th December 1995 and have been in custody since the 7th of December 1995. Whatever sentence I will pass on you is to be deemed to have commenced on that day.

The sentence of this Court is that you will serve 8 years imprisonment which period will be deemed to have commenced on the 7th December 1995.

S.W. SAPIRE
ACTING CHIEF JUSTICE