

IN THE HIGH COURT OF SWAZILAND

CRIM. CASE NO. 80/97

In the matter between

THE KING

VS

1. BHEKEE SIHLONGONYANE

2. MATHOKOZA KUNENE

CORAM : DUNN J.

FOR THE CROWN : MR .J. MASEKO

FOR ACCUSED NO.1 : MR R. DLADIA

FOR ACCUSED NO.2 : MR M. NXUMALO

JUDGMENT

16TH DECEMBER 1997

The two accused are jointly charged in an indictment of two counts, with the murder and robbery of Thabo Michael Magagula at Bulunga area on the 1st February 1997. The accused pleaded not guilty to the charges.

The crown's evidence is to the effect that a white sedan motor vehicle drove past a homestead, in the Bulunga area where a prayer service was being held at about 3.00p.m. Saturday 1st February 1997.

Shortly thereafter some gunshots were heard. The witness Mciniseli Dlamini and other persons who were at the prayer service left the service in order to investigate the source of the gunshots. The white vehicle was then seen reversing to a nearby bush. Two men then proceeded to remove an object from the vehicle which they placed in the bush. The vehicle then drove off. The object that was left in the bush was later found to be the body of the deceased. There was a gunshot injury on the left side of the deceased's neck.

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Dr. Reddy, the Police Pathologist, compiled a report indicating that the deceased died as a result of a firearm injury. Details of the location and track of the injury are set out at page 2 of the report which was handed in by consent as part of the evidence in this case.

The deceased's body was identified by his brother Sikelela Magagula. According to Sikelela the deceased was employed by him as a taxi driver. The deceased had left home on the morning of the 1st February driving a white Toyota Cressida Sedan registration No. SD 507 V.M. Sikelela next saw the motor vehicle about two weeks after the 1st February 1997 at the Malkerns Police Station. The vehicle had according to the police been found abandoned at Mkhumbane area on the 5th February 1997.

At about 5.00 p.m. on the 1st February 1997 Sipho Mamba an employee of Tibiyo TakaNgwane came across a white Toyota Cressida Sedan parked in the bushes at Luvatsi Ranch. The vehicle's registration plates had the letters V.M. The vehicle was unattended. As Mamba walked away from the vehicle he met two men one of whom drew a gun and ordered him to come closer to them. Mamba was made to remain with the two men until after sunset when the two men drove off in the vehicle.

According to Mamba, the reason given by the two men for his detention was that they wished to remain in hiding until after sunset as they feared that if they released him, he would make a report to his co-workers. It was also Mamba's evidence that one of the two men whom he identified as accused no.1 stated that he knew Mamba's home

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area and that they started talking of events in that area. Mamba identified the second man as accused no.2. The two accused later returned to the ranch, in the company of the police on the 24th February.

According to Mamba the police asked the accused if he (Mamba) was the man. The accused replied that he was.

Mlotshwa Mbhamali, a traditional healer (inyanga) told the court that he was paid a visit by two men on a Saturday night some time early this year. The two men came in a white sedan. Mbhamali identified the two men as accused no.1 and 2. According to Mbhamali the accused requested him to use his bones to divine as to why they had come to him. Mbhamali did so and told the court that he informed the accused that they would be arrested as the police were after them. The accused then stated that they had shot and killed a person at Bulunga area for refusing to hand over his motor vehicle to them.

According to Mbhamali the accused requested him to assist them in avoiding detection. Mbhamali told the court that he informed the accused that his fee would be E2,00.00. The accused said they did not have any money. They instead left a handgun and ammunition with Mlotshwa, saying that they were going to look for money. Accused no. 2 returned on a Sunday to collect the handgun and ammunition.

No payment was made to Mlotshwa.

Mlotshwa turned out to be a most difficult and unreliable witness. The court was obliged to intervene in an attempt to clarify his evidence as to the exact sequence of events and as to precisely at what stage the alleged confession was

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made to him by the two accused. It was Mlotshwa's evidence that he did not assist the accused as they had requested, because they did not have the money for his services. The question of the gun being left as a form of security remains a mystery. Mlotshwa was at first forthright and certain that accused no.2 had returned to collect the handgun on the very next day following the accused's visit to him. He was later questioned as to whether or not he had reported to the police that the accused had confessed to him. His reply that he had reported the incident to the police on the Sunday following the accused's visit placed him in difficulties, necessitating his having to change his evidence to stating that accused no.2 had collected the gun on some other Sunday.

Luigi Dlamini told the court that he knew the two accused. Sometime in January or February 1997 accused no.2 offered to sell him a radio/cassette player, for his motor vehicle. Accused no.2 later delivered the" radio/cassette player at Dlamini's work place. The cost of the radio/cassette player was E100.00. It, was Dlamini's evidence that he paid accused no.2 a total of E30.00 before the police came with accused no.2 and took possession of the radio/cassette player.

A member of the Umbutfo Swaziland Defence Force came across accused no. 2 on the 18th February 1997 in the big Bend area. Accused no. 2 was searched and he was found in possession of a handgun and 42 live rounds of ammunition. Accused no. 2 was handed over to the police at Big Bend.

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Accused no. 1 was arrested in Nhlanguano in connection with some other matter. The Manzini Police men started interrogating the two accused in connection with the present charges. According to the investigating team the houses of the accused, in Big Bend, were searched in the presence of the accused on the 23rd February. An umbrella, 12 cassettes and a carton of electric bulbs were found in accused no. 2's house.

The umbrella, 8 of the cassettes, the electric bulbs, the radio/cassette player recovered from Dlamini were identified by deceased's girlfriend, Gugu Zwane, at the Manzini Police Station as items belonging to the deceased.

According to the investigating officers a third person, Zweli Hlatshwayo was also taken into custody in connection with the murder of the deceased. The officers were not in a position to give the precise date of Hlatshwayo's arrest. Accused no. 2's Attorney maintained throughout the cross examination of the officers that Zweli was arrested before accused no. 2. Detective Sergeant Mkhabela told the court that on the 28th February the two accused in the company of Hlatshwayo went and pointed out a spot where pieces of plastic which were said to be windshields for a motor vehicle were recovered.

The witness Zweli Hlatshwayo gave evidence and left the Court with the distinct impression that he knew substantially, much more than what he testified to. He was a most evasive and shifty witness.

He stated that he had

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been subjected to assaults and torture with the two accused by the investigating officers. It is not clear as to why he was assaulted and tortured if as he told the court all he did was to attempt to assist the two accused in selling a motor vehicle. It was his evidence that he was approached by the two accused in the evening whilst he was at his in-laws place at Sitfwetfweni area near Hhelehhele sometime in February 1997. The accused were driving a car which accused no.2 said he was selling.

The vehicle was a Toyota Cressida Sedan. Hlatshwayo did not take notice of the registration plates. It was Hlatshwayo's evidence that he went with the two accused to one Robert Mkhabela at Ngwane Park. He thought that Mkhabela would be interested in the vehicle. Mkhabela was not interested in the vehicle and the accused requested him to accompany them to Big Bend so that he could return with the vehicle for safe keeping at his place in Manzini. Hlatshwayo states the he agreed and proceeded to Big Bend. The accused removed an Umbrella, car radio cassettes and light bulbs from the -vehicle.

He then drove the vehicle and parked it in a forest at Timbutini. On the following morning, he met accused no.2 and told him that he would let him know where the vehicle was after a buyer had been identified. Later that morning he met with Robert Mkhabela who made a report to him about the owner of the vehicle. He (Hlatshwayo) confronted accused no.2 with the report and accused no.2 stated that accused no.1 had shot the deceased. Thereafter arrangements were made for him to go and show accused no.2 where the vehicle was parked. Accused no.2 never turned up at the appointed time.

Instead one Sipho Zungu came and collected the motor vehicle. Throughout

this, Hlatshwayo elected not to report the matter to any body.

In the course of the trial, when Hlatshwayo could not be located to come and testify, Mr Maseko for the crown indicated that Hlatshwayo was in fact an accomplice witness. I pointed out that that was not apparent from the summary of evidence furnished by the crown. It became quite clear in the course of Hlatshwayo's evidence precisely why Mr Maseko had indicated that Hlatshwayo was an accomplice.

As I pointed out earlier, it is quite clear that Hlatshwayo knows a lot more than he was prepared to tell.

Despite his not having formally been introduced at an accomplice it is necessary that his evidence be approached with caution.

The accused each gave evidence on oath in which they stated that it was Hlatshwayo that approached them whilst they were seated in accused no.2's house in Big Bend and requested accused no.2 to deliver the car radio/cassette player to Luigi. Hlatshwayo then made a loan of E50.00 from accused no.2 that he would leave the cassettes and other items as security for the loan.

The accused denied being on the Tibiyo farm. It was their evidence that they were taken to the farm by the police after their arrest and shown to Mamba.

The two accused remained totally unshaken in their evidence of how the items that were identified as belonging to the deceased were found in accused no.2's house at Big Bend.

They maintained that the pointing out of the pieces of windsheilds was done by Hlatshwayo.

The explanation given by the accused for the visit to the Inyanga, Mlotshwa was that accused no.2 had a chest ailment for which he required attention. He was given medication by Mlotshwa and the handgun was accepted by Mlotshwa as security for his fees.

There is no basis on which the evidence of Hlatshwayo can be accepted in preference to that of the accused. Hlatshwayo proved himself to be a totally unreliable witness. Approaching his evidence with the necessary caution, he does not make it pass the first test set out in the case of *MANDLA HOMEBOY DLAMINI v.R.* 1982-86 II SLR. 384.

A similar fate must follow the evidence of Mlotshwa. The accused have given a plausible explanation for their visit to his homestead. He has turned out to be an unreliable witness.

When the shortcomings and discrepancies in the evidence of Mlotshwa and Hlatshwayo were pointed out, Mr Maseko proceeded to urge the court to draw certain inferences from what he described as the evidence as a whole. The first inference he sought to have drawn was that the firearm which was left with Mlotshwa was the firearm that had been used in killing the deceased, for the reason that the accused told Mlotshwa that they had shot and killed a person. This inference cannot be drawn. A spent bullet was extracted

from the deceased. That bullet and the firearm were sent for ballistic analysis. It could not be established that the spent bullet had been fired from the firearm. This direct evidence rules out the need for speculation and inferences.

The next inference sought to be drawn is that the white sedan referred to by Mamba was that of which the deceased was robbed and the one which Hlatshwayo stated the accused were selling. Mamba was never shown the vehicle that was recovered at Mkhumbane and which the deceased's brother identified. Hlatshwayo was never shown the vehicle either.

Robert Mkhabela who was said to have inspected the vehicle which Hlatshwayo said the accused were selling was never shown the vehicle identified by Sikelela. Robert was in fact not even called as a witness. He may have confirmed that accused were the sellers of the vehicle. The second inference cannot be drawn.

The Malkerns Police were said to have called in the Scenes of Crime Unit to examine the motor vehicle. Finger prints were said to have been lifted from the vehicle. The court has not had the benefit of the evidence of the person who examined the vehicle and as to whether the finger prints that were lifted matched any of the accused.

At the end of the day, the evidence which the crown relied upon to link the two accused with the offences charged has turned out to be worthless in the face of the explanation given by the accused for their possession of the goods that belonged to the deceased.

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The accused are found not guilty. They are acquitted and discharged on both counts 1 and 2.

B. Dunn

JUDGE