

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CR. CASE NO. 133/91

R E X

vs

ABSALOM MASIMINI MAVIMBELA

DOUGLAS KHISHANE NXUMALO

C O R A M : M.J. STRYDOM
FOR THE CROWN : J.M. BWONONGA
FOR DEFENCE : MR. M. MAMBA

JUDGMENT

06/06/94

The accused are indicted on a charge of murder. It is alleged that on or about 13 September 1991, at or near Ngudzeni area in the district of Shiselweni, they, acting with common purpose, wrongfully, unlawfully and maliciously killed and murdered Mthana Mamba by shooting him with firearms. They pleaded not guilty to the charge.

Six witnesses testified on behalf of the Crown namely Dr. Solomon Berson (Police Pathologist), Sipho Simelane, Khali Mamba, Musa Hedzane, Philemon Msibi (a sub-inspector) and J.L. Magagula (a detective constable). Both accused testified in their defence.

Sipho Simelane, a taxi driver, testified that during the night of 12 September 1991 at approximately 22h00, the deceased and others hired him to take them home. En route and at Tshabalala corner, Ngudzeni, a bus approached his taxi from the opposite direction. When the vehicles were "about to meet", the bus was driven towards the taxi's side of the road. Simelane swerved to his right hand side. The bus then swerved back to its left hand side. Simelane stopped the taxi as the bus was "blocking him". Simelane then reversed the taxi and heard voices coming from the bus saying "it is them, it is them".

The taxi, a sedan motor car, came to a standstill whereupon the driver of the bus (Khali Mamba) and the two accused alighted from the bus. Mamba was armed with a spear. Accused 1 was armed with a shotgun which he was carrying and with a "short gun" which he had tucked into his belt. Accused 2 was also armed with a shotgun. They went to the taxi. Khali went to the right hand side of the taxi whilst accused 2 went to the front of the taxi. Accused 1 went to the left hand side of the taxi. Accused 2 aimed at the "middle of the windscreen" and fired one shot. Accused 1 fired a shot through the window of the passenger's door. The deceased, who was on the passenger's side, was shot. After accused 1 fired the first shot, he went to the driver's side and fired another shot into the taxi. Khali then recognised Siphon inside the taxi. Siphon was instructed to take the deceased to hospital. The deceased had a "hole" in his chest.

During his evidence, it transpired that Siphon was uncertain as to the positions from where the two accused fired the shots. He changed his evidence and stated that accused 1 fired with a shotgun from the front of the taxi whilst accused 2 fired into the taxi through the windows of the two doors. During cross-examination it was put to him that both accused merely fired shots into the air when they were approximately 10 metres away from the taxi and that they did not aim at the taxi at all. This was denied by Siphon. In reply to questions put by the Court Siphon says that only 2 shots were fired, one by each accused.

Khali Mamba says that whilst he was asleep in his house at approximately 23h00 on 12 September 1991, he was attacked by two men in his room and robbed of approximately E320.00. When the men fled, he and his wife ran outside and raised an alarm. He saw a sedan motor vehicle drive off with the robbers. The vehicle stopped some distance away and the lights of the vehicle went off.

He and approximately 10 other men drove towards the vehicle in his bus. When the two vehicles "were about to meet" the lights

of the taxi went on. He stopped the bus and flicked the bus's lights indicating to the driver of the taxi to stop. The taxi stopped. He got out of the bus, went to the driver of the taxi and asked the driver "why he is killing him". The driver of the taxi then reversed. Khali Mamba went back to the bus and followed the reversing taxi. When both vehicles thereafter stopped, the people in the bus alighted. Two of the men in the bus had firearms. Each of them had a shotgun. The others had spears and bush-knives. He then heard shots being fired. He does not know who fired the shots. Mamba went to the driver of the taxi and asked him "why he was running away". The driver replied by saying he had heard some people saying "this is the vehicle, lets hit it". The driver then said that when Mamba wanted him to stop he thought that Mamba was drunk. They further conversed. The driver told him that his passenger, who was full of blood, had been shot. While he was conversing with the driver, the one accused was standing on the one side of the taxi and the other accused on the other side.

Musa Hedzane says that while he was in his house at approximately 23h00 on 12 September 1991, he heard a noise at Mamba's house. He noticed a red sedan vehicle approach. However, it turned and drove away. A number of men followed the vehicle in the bus. He himself was armed with a knobstick. The two accused each had a shotgun. Mamba had a spear. The others were unarmed. They drove to where the taxi was. When they approached the taxi they tried to block its way. The taxi reversed. Mamba followed the taxi with the bus. When the taxi stopped Mamba alighted and went to the taxi. The taxi again reversed. Mamba went to the bus and drove to the place where the other men, who had earlier alighted from the bus, were. As from that stage in his evidence, Hedzane became extremely evasive. He says that the deceased got hit as the bus was approaching the men who had earlier alighted.

He says that he heard two shots being fired. At that stage he was standing next to the bus.

He does not know who fired the shots. He then says that he does not know who fired first because "the guns fired simultaneously, the guns carried by the two accused". Thereafter a conversation took place between Mamba and the driver of the taxi. Mamba told the driver to take his injured passenger to hospital.

Philemon Msibi, a sub-inspector stationed at the Police College, testified that he tested the two shotguns which had been taken from the accused by the investigating officer, and found them to be serviceable.

Magagula, the investigating officer, testified that shortly after midnight on 13 September 1991 he received a report that the deceased had been shot and taken to hospital. He and a colleague proceeded to the scene of the shooting. When they were in the Hlathikulu township, they came across the bus in question. The driver took the bus to the police station where the occupants were questioned. He seized the two shotguns which the two accused were carrying and detained the accused. He also caused photos to be taken of the taxi (exhibits B1-5). On exhibit B2 a hole in the windscreen and on exhibit B3 (1) in the lower left front door of the vehicle are to be seen.

According to Dr. Berson the deceased died of a shotgun wound of the chin and chest with haemorrhage. The features of the wound are those of a tangential shotgun wound passing from the region of the chin, in a direction downwards and to the right of the chest. He says that the features are those of a very near contact shot.

Accused no. 1 testified that during the night of 12 September 1991 he was asleep when he heard an alarm being raised. He went outside taking his shotgun with him. He noticed the bus and boarded it. There were other people in the bus. He was told by "those beaten up" that the people in the vehicle "had disturbed them". The vehicle, a taxi, was visible. They travelled to

where the taxi was. When they reached the taxi, which was then stationary, it turned and came towards them.

There were two men in the taxi. The man who was assaulted, Khali Mamba, said that those two men had attacked him in his house. When the two vehicles were close to each other, they stopped. Mamba alighted and went to the vehicle. The taxi reversed. Mamba went back to the bus and drove towards the reversing taxi. After about 100 metres, the bus caught up with the taxi. The occupants of the bus alighted and went towards the taxi. When he himself alighted, he fired his shotgun into the air at an angle of approximately 45 degrees. He was then approximately 20 metres from the taxi. He fired one shot only. Two other shots were fired at the same time. He does not know where accused 2 was when the latter fired a shot. It was later discovered by the others that someone in the taxi had been injured. He did not go to the taxi himself.

He says that when he fired the shotgun, he did not aim to shoot anybody. He did not realise that any other person in their group would endanger anyone's life. He did not foresee that anyone else would use a firearm. There was no agreement by the people in the bus to injure anyone. He states that they went to the taxi to find out whether it was the vehicle that had left the scene at Mamba's house. They would however not have done anything to the occupants. He says that only Mamba would then speak to them and ask them why they had taken his money. He says that three shots had been fired. He does not know who fired the third shot. Accused 2 told him that he had also fired but did not tell him how many shots. He did not see anyone else than accused 2 carrying a firearm. After three shots had been fired, he saw accused 2 to the left of the taxi approximately 3 metres away. Accused 2 corroborates accused 1 in the main as to what had happened prior to the shooting. He says that he alighted from the bus with the others. When he fired the shot into the air he was approximately 20 metres behind taxi.

He fired upwards into the air at an angle of approximately 15-20 degrees. He fired over the taxi. His intention was to scare the occupants of the taxi. He fired once only. He heard one other shot when he was in the process of going to the taxi. He saw a firearm in accused 1's possession. He saw no one else carrying a firearm. He says that he did not intend to injure anyone. He says that when he arrived at the taxi, the deceased was sitting next to the taxi. He assisted the deceased back into the taxi. The deceased told him that his arm was painful. He saw no injury to the deceased's arm. However he saw an injury to the deceased's chin.

That completed the evidence in the case.

I now have to decide whether the Crown has proved its case of murder against the two accused. It should at the outset be stated that the three eye witnesses called by the Crown did not impress me as good or very reliable witnesses. Khali Mamba and Musa Hedzane, especially, were very vague when it came to that portion of the evidence as to what had transpired immediately before and during the shooting incident. It was obvious to me that they were friends of the accused and went out of their way not to implicate the accused directly in the shooting of the deceased. Sipho Simelane was somewhat confused at the initial stage as to who had actually fired the shot through the taxi's windscreen. At the commencement of his evidence he stated that it was accused no. 2. Thereafter he said that it was accused no. 1. He also stated that accused no. 1 fired shots through the left and the right windows of the taxi's front doors. He later stated that accused no. 1 fired through the windscreen, and that accused no. 2 fired one shot only through the lower part of the left front door. This caused me to have Simelane recalled as a witness after the Crown and the defence had closed their cases. He was then adamant that accused no. 1 in actual fact fired through the windscreen and that accused no. 2 fired the one shot only through the left front door.

The two accused likewise did not impress me as truthful or reliable witnesses. As to the events prior to and shortly after the shooting, they gave their evidence well. However, they were extremely vague in regard to the shooting incident itself.

It is a fact that the deceased had been shot with a shotgun during the night in question and whilst he was still inside the taxi. It is also a fact that only one shot could have caused him the wound to his chin and chest and that is the one fired through the windscreen. The question then is who fired that shot. According to Simelane it was accused 1 who had fired that shot. He says that accused 1 was in front of the taxi and had the shotgun against the front window when he fired.

His evidence is, however, suspect in view of the fact that he initially stated that accused no. 2 had fired that shot. Had Simelane's evidence been the only evidence in the case, I would undoubtedly have given both accused the benefit of the doubt and acquitted them. Simelane's later evidence is however to some extent corroborated by each of the accused as to the general positions they were in when each of them fired a shot. Accused 2 places himself behind the taxi whilst accused 1 says that he was in front of the taxi although some 20 metres from it when he fired over the taxi. In view of the fact that the two accused were the only men armed with firearms on the night in question, the only inference that can be drawn from all the evidence is that only one of them could have caused the fatal wound. Having regard to the evidence of Simelane and that of both accused relating to the positions in which they were when they fired shots, the only further inference that can be drawn is that the fatal shot must have been fired by accused no. 1. I reject his evidence as false and not reasonably true that he fired the shot into the air. I am consequently of the view that accused 1 fired the fatal shot through the windscreen, and thereby caused the death of the deceased. By acting as he did he could only have intended to kill the deceased. As far as accused no. 2 is concerned, I am not convinced that he too must be found guilty

of murder. There is no evidence before me of any prior agreement to kill the deceased or the occupants of the taxi. It has also not been shown that he contributed causally to the killing or wounding of the deceased. In a nutshell, it was not proved that he intended to make common cause with accused no. 1. No adverse inference can be drawn from the fact that he fired a shot through the front passenger door. It was almost simultaneously with the shot fired by accused no. 1. In any event the deceased was not wounded by the shot fired by accused no. 2. Had accused 2 intended to kill the deceased, he would have fired directly at the deceased and not at the lower left of the left passenger door. I am consequently of the view that he should be given the benefit of the doubt, and that he should be acquitted. Accused 1 is found guilty of murder. Accused no. 2 is found not guilty and is discharged.



M. J. STRYDOM

JUDGE OF THE HIGH COURT OF SWAZILAND
