



IN THE HIGH COURT OF SWAZILAND

CRIM. T. NO. 203/95

In the matter between:

REX

VS

NDABENHLE MILTON MSIBI

CORAM : A.F.M. THWALA
FOR THE CROWN : MR. WACHIRA
FOR THE DEFENCE : MR. FINE

JUDGMENT

14/03/95

The accused is charged with the murder of Allen Khumalo. The doctor's evidence was handed in by consent. The report states that the cause of death was multiple injuries. At page 2 the doctor summarizes his findings as follows:

Fresh Abrasions above lateral aspect left eyebrow, just lateral to the right eyebrow, (small area) and medial border right upper arm proximal third. Bruising 2 areas over the posterio lateral aspect of the right buttock mid third region, below the right anterior iliac spine and over the right anterior axillary fold. And at page 3 The Skull subaponeurotic haemorrhage left frontal region laterally, occipital region left side and right occipital region laterally skull intact.

Ribs and Chest Wall Fracture: Left ribs 2-11 posterior third and 8,9,10 fractured in midthird. Fracture right 3rd rib , proximal third. Marked intercostal haemorrhage in relation to the fracture sites. In the Pleural cavities right he found large volume of free blood present. In the abdomen there was a large amount of blood, large amount of partially digested food with alcohol odour. That is what the doctor's report states.

The Crown then called Zephaniah Magagula. His evidence is that he saw two cars. They passed each other in the opposite direction. The one which was going towards Manzini was a Mercedes and the one going upwards was a van. The mercedes then turned and followed the van. This was at the T-junction where this happened next to the bar. He then walked and followed these cars. He found them next to St. Pauls or the church , they were parked. It took him about 6 minutes from where the cars started chasing each other to where they had parked. The mercedes was then parked facing Manzini and there were some Shangaans there. He was able to identify the driver as the accused. He then drove off. The Shangaans were helping or were trying to help the deceased, the driver of the van. He suspected that they may pick-pocket the driver of the van and he reported to the security guard. The security guard was pw5. Then he left leaving the Shangaans.

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The Crown then called Alex Sithole who testified that he saw the two cars and the van following each other. They stopped at the gate or near the gate. The driver of the mercedes alighted and pulled out the driver of the van and assaulted him. They went there and intervened. The driver of the mercedes then drove off.

They helped the driver of the van who is the deceased and put him on the driver's seat. He was with pw3 Maria and Sargo. After they had helped the driver, they then left. Immediately they left, a policeman came and searched them. He was invited to go and demonstrate how the cars were parked. He demonstrated where the cars were parked and how they were parked. I must mention at the inspection the accused parked his mercedes where during the cross examination it was alleged it was parked. There was a ditch next to where he parked. The purpose of the cross-examination was to establish that two cars could not park parallel there because there was this ditch. I must also mention that in his evidence he gave a different story.

The Crown then called Jao Msimangu. There is no material difference in their evidence except the positions of the cars pointed different spots. He confirms the evidence of Sithole that the driver of the mercedes parked and opened the door and pulled the driver and assaulted the van driver. They both say that the driver said he was driving a government car he could not pay for the damage. They warned him to take the driver to the police. He also confirms that when they left the deceased after they had helped him into the car, they were searched by the police.

This witness also says he took the keys and left them on the floor of the van. This is not true because the accused said he took the keys to the police, but this is not material defect. The two confirm seeing the cars and the cars stopping and the driver of the mercedes who is the accused then assaulting the deceased who is the driver of the van. In short the two Shangaans saw the driver of the mercedes assaulting the deceased. It is not denied that they were there.

At the time when pwl Magagula passed there, they were in the process of helping the driver of the van into the van. That is why he said the driver was hanging out of the door. This is confirmed by pw5 that is the security guard and Assistant Superintendent Dlamini, who found the deceased in the car on the driver's seat. That explains why pwl said that he found him hanging at the door. According to the accused he left him on the ground. Assistant superintendent Dlamini then handed the matter to the traffic police. The traffic police took him (the deceased) to Manzini. There is no evidence that he was assaulted at the police station and that he received any injuries on the way.

The Crown has also led the evidence of Mondlane who was an inmate of the cell. Mondlane said nobody assaulted the deceased in the cell.

The accused gave evidence. His evidence supports pwl that the two cars passed each other in the opposite direction and the other car turned and followed the van. He also confirms that they stopped near the Methodist Church. He went to the van driver but he denies that he assaulted the driver. The Shangaans say he assaulted him.

The evidence confirm that the cars started from near the Bar (i.e. Mthunyelelwa Bar) according to pwl, and they stopped next to the Methodist Church, and accused went to the van but he does not describe what happened.

According to him he took the keys to the police because appeared drunk, he could not talk to him. Now the Court has to decide whether the accused assaulted the deceased. The two witnesses who gave evidence that the accused assaulted the deceased do not know the accused and they have no reason to tell lies against him . They were cross-examined and they explained the events as they happened especially Sithole. The other factor which must be taken into account is that the deceased was driving and he collided with accused's car and accused's car followed him and stopped him while driving. He drove from next to Kamthunyelelwa Bar up to the Methodist Church. After the accused had gone to him and taken the key according to the accused he was left there. By then he could not speak nor walk. The Shangaans say he assaulted him and he even tried to put him underneath the mercedes and attempted to run him over. He was left there and helped by the Shangaans into his car. This person was driving up to that point. After the assault he could not stand up or speak. The extent of injuries is described by the doctor. I am asked to make an inference that the van driver (that is the deceased) might have received the injuries before he collided with the accused's car, that he was able to drive with these injuries, and that he might had been assaulted by the Shangaans.

All those are possibilities. Difford's case does not mean that I can come and say I shall go to the moon tomorrow and that I must not disbelieve that because it is a possibility. The inferences referred to in Difford's case are inferences which can be drawn on a set of facts in a particular case.

Here we have the evidence that the deceased was injured to this extent, and he was seen by the Shangaans being assaulted by the accused. We also have evidence from the accused and the Shangaans and pwl that the cars were stopped at the Methodist Church.

It was only when the accused left that the driver of the van, (the deceased) was left helpless and could not stand up or speak. The shoes he wore or bare feet could cause the injuries which were found by the doctor. I mention the shoes because it was said sandals, and I also mention them because when I wanted the police to identify what the accused was wearing he began with sandals. It was surprising for a police when you ask him what a person was wearing to begin with shoes. That also confirms my thinking that if the deceased did not die in police custody, this case may not have come to this court because I cannot see what is important with shoes when you ask what a person was wearing.

I have also been asked to disbelieve one of the Shangaans because he is a convicted person. When he saw the accused and the deceased he was not a convicted person and he had nothing to gain. Mondlane is also a convicted person, when he saw the deceased, he was in the cell. That does not make him a liar.

In this court, and it is known to everybody, prosecutors bring people who are accomplices to give evidence and the court admits that evidence. Many people who have been convicted give evidence in this court. It was only by chance that these people were still serving when they came to give evidence. So there is no substance that the court must not believe these people because they are convicted people.

The deceased died as a result of the blows delivered by the accused. The reason being that the deceased collided with his car. The accused must have been angry and annoyed. The accused demonstrated in court that he is not a reliable witness. He said he was not annoyed when his car was bashed by the van driver. It was the annoyance which led him to assault the driver. If he was not annoyed he could have pulled the driver into his car and taken him to the police.

Then I am asked to find him guilty of murder. I do not think in the circumstances of this case he should be found guilty of murder. If he ran over the deceased I would find him guilty of murder. The assault was brutal. He had no right to assault the deceased, the police could deal with the deceased but through extreme provocation and pride according to the Shangaans 'you are driving a government car, you are not even going to fix my car' then he assaulted him.

I think because of the provocation and his going to the police after the assault does not show an intention to kill though he was reckless. May be he went to the police because he is known. They know him through the sandals he wear.

I find the accused guilty of culpable homicide.


A.F.M. THWALA

JUDGE
