



# IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIM. T. NO. 167/94

In the matter between:

REX

VS

1. GABANGAYE MATSENJWA
2. BILLY MAGAGULA

CORAM : A.F.M. THWALA  
FOR THE CROWN : MR. NGARUA  
FOR THE DEFENCE : MR. SMITH

## JUDGMENT

08/06/95

The accused are charged in count 1 with murder in that on the 4th October, 1991 they murdered Siphiwe Magongo. In count 2, no. 1 is charged with the crime of robbery in that on the 4th October, 1991 he robbed Jabulane Zwane of one jacket.

The post mortem report was handed in by consent. The cause of death is stated as multiple injuries. Paragraph 2 of the report which is headed "External Appearance" reads as follows:

"Fresh abrasion forehead right side, periorbitally bilaterally, both cheeks side of the neck bilaterally, more marked left side, over and below the point of the chin, around the left shoulder region posterior aspect left elbow region, lateral

aspect chest left side, distal third, lateral aspect pelvis, proximal third, lateral aspect left knee joint medial aspect right knee joint to right of the umbilicus medial aspect left breast, lower border right breast, posterior aspect right elbow region, lateral aspect of chest and abdomen, right side".

The abrasions over the back have a linear appearance and those over the face and left side of the neck are confluent areas. Blood specimens were taken from the deceased and both accused.

The Crown called Themba Dlamini the Chemist from the police. He received the blood samples of the deceased, accused no. 1 and no. 2. He also received a blood stained jacket marked Gabangani Matsenjwa, a blood stained skipper, white in colour marked Billy Magagula and blood stained brown shoes marked Gabangani Matsenjwa. He analysed the blood samples. His findings were as follows:-

"The blood samples from deceased body was group A negative. The blood from accused no. 1 was group B negative and the blood from no. 2 was group O negative. The blood samples were found to be human blood. The blood stains from the maroon jacket marked Gabangani Matsenjwa and the blood stains from the shoes marked Gabangani Matsenjwa were group A negative and matched with the deceased blood".

The blood sample on the white skipper was not conclusive. He was cross-examined and stated that he did the tests carefully and that he repeated them several times to exclude any mistakes.

The next witness was Constable Ezrome Simelane who said he went to the scene of crime and found the dead body. He was told that the deceased was Siphwe Magongo who stayed with Mashaba. He went to Mashaba's place. He then arrested no. 2. He cautioned him. He told him that no. 1 knew about the crime. He asked him to give him the clothes he was wearing the previous day, i.e. the day the crime was committed. He gave him a white skipper which was torn on the shoulders. It had what appeared to be stains of blood. He also arrested no. 1. He cautioned no. 1. He then told him that no. 2 committed the crime. He gave him a pair of brown shoes and other items of clothing. The pair of shoes had blood stains and human hair. The accused were then detained in different police stations. He was cross-examined about the hair. He said he did not know what happened to it. He handed it to Sub-inspector Dlamini. He confirmed that the accused pointed at each other. It must be observed here that he did not mention any injury on no. 2's head.

Sub-Inspector Dlamini stated that on 5th October, 1991, he went to the scene of crime. He observed blood stains which led to a maroon track suite. He also found a white shirt, a pair of white shorts and a belt. These were female clothes. These were the clothes which the deceased wore the previous day.

He then went to deceased body which was lying facing down. She wore black pantihorse and a pant. She had no clothes on the upper part. He handed all the exhibits to the laboratory. It must be pointed out here that the shorts, white shirt and the hair were not examined by the chemist. No reason was given by the police witnesses. They were not among the list which was given to Themba Dlamini the chemist.

He called Jabulane Zwane who had made a report the previous night that he was robbed of the track suite top. He identified the track suite found at the scene. He said he called accused no. 1 but this is denied by Jabulane Zwane. He was cross-examined. He said when he collected the exhibits, there were no suspects. he called Jabulane Zwane who had made a report the previous day. He identified the track suite. He said it had no blood when it was taken from him. He also said there was an independent witness who was called to say he saw the robbery. This witness was also not cross-examined about the injury on no. 2. If no. 2 was injured and had a bandage, he must have most probably mentioned the injury.

Jabulani Zwane stated that a person came to him at Litchfield Grocery. He grabbed him and clapped him. He pulled him. He asked what he was doing, he did not answer him. He then hit back. They fought until people separated them. The person took the top of the track suite. The person was walking alone at the Grocery. Jabulane said he was with four other boys. Jomo Maseko told him that no.1 was Gabangani Matsenjwa.

He went to the company of Security Guards and asked them to help him take his track suite from no. 1. He could see no.1 when he made the report to the Security Guards. The Guards told him to go to the police. He went to the police and made a report. He gave them the name of the accused. The police told him that they would call him when they get the track suite. They told him that they know no. 1. He was then called by the police. He identified the track suite. The track suite was then dirty. He denied that no.1 was present when the was called at the Police Station.

In cross-examination he described the fight. He told the court that he let loose the track suite when no.1 held it. He said he was seeing no.1 for the first time that day. He was then told his name by Jomo Maseko. Maseko and he left no.1 outside the Grocery and went to the Security Guards and asked them to assist him. They told him to go to the police. He said there was electric light. He denied that he is mistaken about the identity of no. 1. He also confirmed that he did not see no.1 at the police station. he estimated the time to be about 8:00 p.m.

Amos Tala stated that he arrived at the bar at about 8:00 P.M. He saw the deceased who was standing with no. 2. The deceased was no. 2's girlfriend. He then saw no.1 and no. 2 chasing the deceased. The deceased raised an alarm. He was then cross-examined. He stated that he came at about 8:00 p.m. and the chase started at about 9:30 p.m. The bar closes at midnight. He denied that he was drunk when he saw the accused chasing the deceased. He said he was outside the bar.

No. 2 was also outside. He stated that he did not see any quarrel at the bar between no. 2 and the deceased. He did not see the deceased hit no. 2. He did not see any blood. It was put to him that the accused and the deceased walked normally. He confirmed that they were chasing the deceased. He said no. 2 and the deceased were standing outside. No. 1 came out when the chasing started. He told the court that he was estimating time. This witness gave his evidence well except that he said there was no due box at the bar.

The body of the deceased was discovered by witness Elphas Msibi. There was no eye witness to the actual killing.

The first witness for the defence was no. 1. He said he came to the bar at about 6:00 p.m. and was with his friends. He said he remained at the bar for about three hours. He stated that he separated with no. 2 when no. 2 was already injured. The bar was about to be closed. He said no. 2 was with the deceased in the bar. They sat at the corner. He saw no. 2 giving the deceased money to buy beer. He did not explain how he saw this when he was at the corner. He said that after that there was a noise. He went to no. 2 and the deceased. He asked no. 2 what was happening. No. 2 told him that they were quarreling over change. He asked the deceased why he was not giving no. 2 his change. The deceased had a stick which she hid behind her legs. The deceased then hit no. 2 with the stick. According to him this was happening at the corner where no. 2 was sitting with the deceased. He does not explain at what stage they went outside.

The deceased then said she had done wrong to hit no. 2. No. 2 was then bleeding. She said they must go to Mashaba's place. She was going to give them money. They went to Mashaba who told them that he had no money. He said they must report to the Security Guards. He was going to give them the money the following week. He denied that they chased the deceased and that the deceased raised an alarm. He said they walked normally to Mashaba's house. He denied going to the Restaurant and robbing and fighting Jabulane Zwane. He said they did not reach the Security Office because no. 2 was bleeding profusely. He left no. 2 to look for transport to take him to hospital. He left no. 2 with a group of people, Mashaba and the deceased. He got transport and came back. He did not find no. 2. He does not know the name of the driver who offered him transport. He thought no. 2 had gone to hospital. When he came with the transport, he found the deceased, but did not ask the whereabouts of no. 2. He asked the crowd of people. Mashaba was also present. He then went home. He was arrested the following day. He saw no. 2 at Malkerns. He had a plaster on his head. He did not tell Constable Simelane that no. 2 knew about the crime.

In cross-examination, he said he spoke to no. 2 when he quarrelled with the deceased. He was sitting at one corner and no. 2 and deceased at another corner. The distance between them was the court's length. He said he could see all that no. 2 was doing although there were tables and people dancing between them. He saw no. 2 when he gave money to the deceased. He said the blood from his shoe came from no. 2 because he was holding him.

He denied that the blood group was confirmed by the chemist as the group of the deceased. No. 2's group is 'O'. If it came from no. 2, it would be group 'O'. He denied that he robbed Jabulane Zwane. He did not give any reason why Zwane picked on him.

No. 2 stated that he went to Litchfield Bar at about 6:00 p.m. He saw no. 1 in the bar drinking with his friends. He saw the deceased who was his girl-friend. He drank with her inside the bar. He quarrelled with the deceased over the change. They then went outside. No. 1 then joined them. He asked what was the quarrel about. He told no. 1 that it was over the change. The deceased then hit him with a stick on the head. The deceased then said she was sorry. She then invited them to go to Mashaba's house to get money. They went to Mashaba's house. Mashaba told them that he had no money. He was going to give them the following week. He denied that he assaulted or killed the deceased. He said he wanted money to buy the last drink. Mashaba said they must go to report to the Security where he would pay the money the following week. When they thought of going to the Security office, he was then bleeding too much. No. 1 then went to look for transport to take him to hospital. No. 1 took some time to come back. They waited for him at Mashaba's house. They left and found Fraser and Vusie who gave him treatment. He then went home. It has been established from Fraser that he shares a boundary with Mashaba. He did not return to Mashaba's place. He was arrested by Constable Simelane. He gave him the white skipper. The skipper was soaking in blood. The blood came from his wound.



It must be observed here that the skipper had a few stains of blood. If it was soaking, it would appear on the skipper. He denied that he mentioned no. 1 to Simelane. He left the bar with no.1 at 9:00 p.m.

In cross-examination, he said the deceased hit him with the stick when they were outside. He did not see where she picked the stick. She then invited them to go to Mashaba who would give them the money. He denied that the deceased was chased and raised an alarm. He was taken by Vusi to his home. When asked by the court he said the police did not take him to hospital because they were still investigating. He said he told his attorney about the injury. He was surprised why he did not question the police about Fraser and Vusie. He told Inspector Dlamini. He was surprised that Dlamini was not cross-examined by his attorney about the treatment.

The third defence witness was Fraser Ngwenya who stated that at about 9:00 p.m. he met no.2 walking like a drunk person. He saw that he was injured. He took him to his house. The wound was not big. He removed his hair and put a plaster on the wound. He gave him some pain killers. He took him half way past Litchfield Bar. He then left with Vusi. He said if there were people next to Mashaba's place could have seen them.

In cross-examination he said he was not related to the accused. He saw the accused coming from Mashaba's side. He was drunk. His clothes had blood. He had blood on his face. The clots of blood on his hair were dry. He shaved him and had to use water to remove the clots which had dried up from his hair. The bleeding was not profusely.

He stopped it and put a plaster on the wound which was small. He said no. 2 hanged his head on the right side but there were no stains of blood on the right side of the skipper. He denied that he discussed the case with the accused.. He said the wound was small, it did not warrant to go to the clinic. He said if there were people in the vicinity, he would have seen them. He did not see no. 2 sweating. Vusi Ginindza confirmed that no. 2 was treated and taken home. He thought that no. 2 was drunk.

The name of Mashaba was mentioned by a number of witnesses but he was not among the witnesses. The court then discovered that he was first arrested and released. The police and prosecutors did not call him as a witness.

The court then called Mashaba as its witness to clarify some points. It was revealed that he was in court when Tala was giving evidence but did not remain for the rest of the trial.. His presence in court did not affect his evidence because what the court wanted was supported by the accused. He said deceased entered his house and threw her shoes. She then went out. Two men were shouting outside. The two men were no. 1 and no. 2. He came out. The two men told him not involve himself because he was not where they were coming from. They said they were taking her to the police. They said they had quarrelled with her. He said the accused were normal but they were shouting. There was no light there. They took her and went towards the security. He fetched his jersey and followed them but did not find them at the security offices.

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Cross-examined by the defence he said the deceased came running and opened the door and threw her shoes. He went out to see what was happening. He saw the accused. They left with her. They pulled her. He said she was her lover. He then followed them to the security offices but did not find them. The deceased did not explain what was happening. No money was mentioned by any of them. He was also cross-examined by crown counsel and confirmed what he said in his evidence in chief and cross-examination by defence. He confirmed that the deceased wore white shorts but did not remember what she wore on top. He denied that the deceased was left with him, no. 2 and other people.

This is the evidence which was led at the trial. The accused do not deny that they left with the deceased from the bar to Mashaba's place. They introduced the injury to no. 2 during the course of their defence. They also led evidence of Fraser and Vusi in its support. What is surprising is that the defence did not cross-examine the police about the injury on no. 2. The skipper which the accused said was soaking in blood does not support his version. The chemist was not able to make any conclusion on the blood which was on the skipper because there was not enough blood. The defence did not question the police and the chemist about the soaking blood. With this in mind the court will examine the case of each accused and assess whether their version can be reasonably true.

I have said that time is not very important in this case because most of the witnesses estimated time. All the events could not happen at the same time.

For example, Jabulane Zwane estimates time to be 8:00 p.m. when he was robbed by no. 1. This is a fact that he was robbed or fought with someone. This is confirmed by the police because he reported the same night. No. 1 estimates that he arrived at the bar at 6:00 p.m. and remained for three hours which means he remained until 9:00 p.m. No. 2 estimates that he arrived at 6:00 p.m. but does not state when he left. Tala arrived at about 8:00 p.m. The accused chased the deceased at about 9:30 P.M. Fraser and Vusi met no. 2 at about 9:00 p.m. It is clear that all these times are estimated. No reliance can be placed on them.

No. 1 is first met by Zwane at the grocery. He fought with Zwane. Zwane reported to the police the same night. His story is supported by the police who told him that they knew the accused. They would call him after they had arrested him. Zwane was given the name of the accused by Jomo Maseko. He was called by the police to identify the track suit which was found at the scene of crime. He last saw it when no. 1 left with it.

No. 1 and no. 2 admit that they were in the bar with the deceased. They were also seen by Tala. The only dispute is whether they left the bar chasing the deceased or walked normally. No.1 told the story that he was sitting at a corner which is the length of this court from no. 2 but was able to see what no. 2 was doing even though there were tables in between and people dancing. He was able to see no. 2 giving the deceased money to buy beer which started the quarrel. They described the fight which was not witnessed by Tala. The observation of no. 1 inside the bar cannot be easily believed.

They went to Mashaba's place. Their arrival is confirmed by Mashaba. Their story that they went to Mashaba to get money at the invitation of the deceased is not supported by Mashaba. Mashaba said they were in a fighting mood. They told him not to involve himself. They said they were taking the deceased to the police. They went towards the security offices pulling the deceased. He followed them to the security but did not find them. The deceased was last seen by Mashaba leaving with the accused.

No. 1 told his story that he left no. 2 with Mashaba, the deceased and other people to look for transport. He got transport but did not find no.2. He asked the group of people and got no answer. He did not ask the deceased and Mashaba even though they were present. He does not know the name of the driver who offered him transport. He then went home. This story is hard to believe when one takes into account the description of the injury by Fraser, the evidence of Mashaba and that no. 1 did not know the person who offered him transport.

The next day the body is found. The track suit which he took from Zwane is found at the scene. When he is arrested by Simelane, he points at no. 2. He gives the police the shoes he was wearing on the previous day. They are found with blood which is the same group with that of the deceased. He maintains that the blood came from no. 2. whose blood group is different from that of the deceased. He maintains that Simelane is telling lies that he mentioned no. 2. The evidence shows that there are many factors which shows that no. 1 is a liar. The factors show that his evidence cannot be reasonably true.

The story of no. 2 is like that of no. 1 that he arrived at the bar at about 6:00 p.m. He does not mention his time of departure. He describes the quarrel with the deceased. He describes how he was assaulted by the deceased. He says he was not annoyed by the assault by the deceased. They walked normally to Mashaba's place. They were told to go to security offices as I described in the case of no. 1. Mashaba does not support this story. I have already described what happened in case of no. 1. The two were the last people to be seen by Mashaba leaving with the deceased. What is surprising is that his defence counsel did not question the police about the injury. The accused then said he left when no. 1 did not return with transport. This story is not supported by Mashaba. The question of people remaining with no. 2 is not supported by Fraser and Vusi because they say they did not find any people in the vicinity of Mashaba's house. They met the accused no. 2. They did not know where he was coming from. He did not tell them how he received the injury. According to Fraser, there were dry clots of blood on his hair which show that he was not bleeding profusely at the time. He did not tell them where he was coming from at that time. Mashaba had seen him leaving with the deceased. His story, taking it together with that of no. 1 and Mashaba's evidence cannot be easily believed. If he met Fraser and Vusi, it must have been after the deceased was killed.

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I find that the two accused are responsible for the death of the deceased. I have now to consider whether they had an intention to kill. It is clear that they were at the bar for a long time. The nature of the injuries show that the deceased was dragged either before she died or after her death. The post-mortem does not show any blows or hard blows. I have come to the conclusion that because of the amount of liquor they had taken, they are guilty of culpable homicide.

In count 2, I am satisfied that no. 1 was properly identified. I find him guilty of robbery as charged.

  
A.F.M. THWALA

JUDGE