



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIM. T. NO. 136/94

In the matter between:

REX

VS

1. JAMLUDI MKHWANAZI
2. MBONGENI ANDREAS MASUKU

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

JUDGMENT

16/06/95

The accused are charged with the crime of murder in count one and robbery in count two in that on 3rd April, 1994 they murdered Donkana Shiba and robbed him his car.

The post-mortem report handed as an exhibit by consent was marked exhibit 'C'. the cause of death is stated as gunshot wound of the neck with haemorrhage. Paragraph 20 of the report which described the external appearance and condition of limbs. It states that:

"Over the back of the neck, just to the left of the midline and 4,0 cm below the external occipital protuberance is a 5 x 5 mm wound with a small collar of abrasion. A track passes downwards, slightly to the right, passes through the cervical spine, with vertebral fracture and inward beveling of bone fragments. There is haemorrhage in the line of the track. (2) Just below the point of the chin, 1.5 to the left of the midline is a 7 x 1 mm irregular wound. The track from wound (1) enters and passes through the mouth and exists through wound 2.

The Ballistic Expert report was also handed in by consent and handed in by consent and marked exhibit 'B'. The examination of the exhibits was done by warrant officer Cornelius Lourens Stander Uitenweerde who states that he received one .38 SPL calibre model 27 revolver, serial no. AA150393. One .38 calibre fired bullet and one .38 SPL calibre fired cartridge case.

On examination of the .38 revolver he found that it was in working order. The .38 calibre fired bullet was fired from the .38 revolver. He could not establish whether the .38 SPL fired cartridge case was fired from the .38 revolver.

The crown led the evidence of detective Constable Ephraem Dlamini. He stated that on 4th April, 1994, he went to where deceased body was. He examined it and found that it had wounds on the back of the neck and the chin.

The wounds looked like gunshot wounds. He also noticed wheel marks next to the body. He then went to a place where it was reported that there was a car parked. The car was a colt grey in colour, registration number, JWX331T. Its doors were open. On the driver's seat there was blood. He then handed the car to the Scenes of Crime Unit.

He then arrested no. 1 at his home. He introduced himself as a police officer. He cautioned him according to the Judge's Rules. On 9th April, 1994 he took him to the kraal of Thokoza pw5 Jabu Mkhwanazi. He gave him a revolver wrapped in a plastic. The revolver was found in a near by field. It was a .38 serial no. 150393. He also took him to the toilet where he retrieved a bunch of keys. He was helped to take out the keys by Sonyboy Dlamini who gave a long stick to use. He took possession of the revolver and the keys.

He then went to Pongolo where with the help of R.S.A. police he arrested no. 2. He searched no. 2's house. He found an empty cartridge of .38 in a jacket pocket. No. 2 told him that the jacket belonged to no. 1. He also cautioned no. 2 according to the Judges rules. He then took no. 1 and no. 2 to deceased's car and his home. At the car he used the keys given to him by no. 1 to open the doors and to start the engine of the car. At the deceased's home, he used the keys to open the doors of the deceased house. The keys were identified by the deceased's wife. He handed the exhibits to Nhlengethwa who took them to Pretoria Forensic Examination.

In cross-examination, he denied that he was implicating no. 1 to help Thokoza and Sonnyboy. He maintained that he was with other officers when no. 1 produced the exhibits. He admitted that he arrested Elija Shiba and kept him for sometime until he was released on the orders of the DFP. Lindiwe Ngwenya gave him the description of no.2. She told him where to find no. 2. He also told the court that the spent bullet and empty cartridge were not returned from Pretoria.

Constable Patrick Mamba confirmed the evidence of Detective Constable Dlamini. He confirmed that he accompanied him throughout the investigation.

Detective Constable Nhlengethwa stated that he went to the scene. He took photographs of the scene. He found a spent .38 bullet in the car. He took the exhibits to the ballistic experts in Pretoria. The spent bullet and empty cartridge were not returned from Pretoria. The photographs and the plan were handed by him as exhibit 'A'.

Jabu Mkhwanazi who is also known as Thokoza told the court that no. 1 and no. 2 were at her home on 3rd April, 1994. They left at 6:00 pm. No. 1 did not return. She saw him in the morning while she was in a bus.

In cross-examination she maintained that Sonnyboy was her son. He was not a Mkhonta. She denied that she asked the police to help her in implicating no. 1. She also stated that she was not present when no. 1 gave the exhibits to the police. She was not cross-examined about no. 1 coming to her home to fetch his trousers although the defence knew that it would be alleged that no. 1 only went to her kraal to fetch his trousers with the police.

The last crown witness was Lindiwe Ngwenya. She stated that she saw no. 1 and no. 2 on the evening of the 3rd April, 1994. A masuku boy, no. 2 held her hand and greeted her. He asked where she was going. She told him that she was going to Mbulungwane. He told her that he was going to ask for a lift for him from a car which was coming. She told him that she did not like lifts at night. He then stopped the car. He said the driver must give her a lift. The driver said he was going to Mbelebeleni. He asked the driver to drop her at Mafehla. She got into the car and sat next to the driver. The accused also got into the car and sat on the rear seat. The man behind the driver fired a shot and said to the deceased he must give them the car. No. 2 held her and pulled her to the bush and had sexual intercourse with her. No. 2 told her that he was working at Pongolo. She was able to identify no.2 because he is like his brother who was her former boyfriend. This was confirmed by no. 2 and Mfuneni Mamba a witness called by the court. In cross-examination it transpired that she did not identify no.1 positively when she saw them during the shooting. She only presumed that the person she saw at the Police Station was the person who was with no. 2. She had no difficulty in identifying no. 2. The crown then closed its case.

At the close of the crown I indicated that the court would like to call Lindiwe's boyfriend to establish if she went to him that night and that she was out that night.

No. 1 gave evidence on oath. He stated that he visited his mother at the kraal of his sister Thokoza. No. 2 brought a message to him about his sister who was at Hlathikulu hospital. He left her kraal between 5 and 5:30 p.m. He did not state how many days he spent at Thokoza's kraal. He denied that he pointed the gun and the keys to the police.

He stated that the police implicated him in order to save Elija Shiba. Thokoza and Sonnyboy asked the police to implicate him. He said he only went to Thokoza's kraal to collect his trousers because his track suit was dirty. His counsel did not cross-examine the police about the visit. In short his defence is a bare denial against the evidence of pointing given by the police.

He also called Miriam Dlamini to show that Sonnyboy Dlamini is not the son of Thokoza. She confirmed that but was not able to confirm that no. 1, Thokoza and Sonnyboy were not in good terms with no. 1.

No. 2 also gave evidence on oath. He admitted that he visited no. 1 at Thokoza's kraal to deliver a message from his sister. They left Thokoza's place before sunset. They parted with no. 1 along the way. He went home and went to work at Pongola the following day. He denied that he was present at the killing. He did not see Lindiwe Ngwenya that night. He confirmed the police evidence that they arrested him at Pongolo. They found a .38 empty cartridge in a jacket pocket belonging to no.1. He denied having sexual intercourse with Lindiwe and identifying himself to her. He also denied that he told her that he was working at Pongolo. He confirmed that he looks like his brother. He also confirmed that the police opened the doors and started the engine with the keys. He also confirmed that the police opened the doors of deceased's house with the keys. He distanced himself from the killing.

The court then called Funani Mamba, the boyfriend of Lindiwe Ngwenya. He confirmed that she came back on 3rd April, 1994 at night. She was shivering. She then told him something in the morning. He then told a certain woman what she told him. The woman went to the police. That led to the arrest of no. 2 at Pongolo. His evidence supports the evidence of Lindiwe that she came to his place of work that night. He also supports her that no. 2 looks like his brother. No. 2 said he did not know Lindiwe's boyfriend and that the shop had no security guard which was a lie.

I have now to test the evidence of the crown and that of the defence and see which is better. The crown evidence against no. 1 is that he left Thokozani's place with no. 2 on the night of the killing. When he was arrested, he pointed the gun which was used in the killing. He also pointed the keys belonging to the deceased. It is also supported by Lindiwe that a gun was used. The deceased was shot at the back of the neck. The post mortem also supports Lindiwe's evidence. Lindiwe positively identified no. 2. No. 1 also confirms that he left Thokoza's kraal with no. 2. The bare denial by no. 1 cannot stand against the evidence led by the crown. No. 2 has been identified by Lindiwe Ngwenya. The evidence confirms that he left Thokoza's place with no. 1. He was seen by Lindiwe at the killing. What Lindiwe told his boyfriend led to his arrest. Lindiwe's evidence is supported by his arrest, her boyfriend, the medical evidence and that he was with no. 1 on the night of the killing. No. 2 stopped the car in order to carry out their intention to kill and robbed the deceased. There was no reason for them to board the car if they did not want to rob the deceased.

I find that the crown has proved its case. The accused are guilty of counts 1 and 2.

A.F.M THWALA

JUDGE

JUDGMENT IN EXTENUATING CIRCUMSTANCES

The accused have been found guilty of murder and robbery. The accused were free to give evidence to show on the balance of probabilities that extenuating circumstances exist. They elected not to give evidence. Their counsel addressed the court. He argued that the motive for the killing is not clear because the car which was subject of the robbery was left near the scene. There is no evidence of premeditation to commit the crime as the car came by chance at the spot where the killing took place. He also argued that because of the absence of planning it cannot be said that the murder was committed for the purpose of robbery. He submitted that the accused were under the influence of liquor and liquor can be taken into account when considering whether there are extenuating circumstances. He further submitted on behalf of no. 2 that the degree of his participation in murder can constitute a factor which can be considered as an extenuating circumstance.

The crown relied on the fact that the accused have not given evidence to establish on the balance of probabilities that there are extenuating circumstances. The crown alleged that the accused had failed to show the court that they had no evil intent or malice in the killing.

The court has now to consider all the relevant circumstances in determining whether there are extenuating circumstances in the present case. It cannot limit itself in the lack of motive, premeditation, liquor influence and less participation by no. 2. These factors are not supported by evidence from the accused and were just given by counsel in his address.

The accused still maintain that they are ignorant and they have been framed by the police. There is evidence that the accused were from a beer drink when the murder was committed but there is no evidence of the degree of drunkenness. The weapon which was used was not obtained during the drinking. The killing did not start from the quarrel which arose during the drink. According to the accused, there was no killing which was caused by their state sobriety. On the point of absence of premeditation, the gun was carried by no.1. The court cannot speculate why he carried the gun and why he used it for the killing. As there is no evidence from the accused, the court cannot conclude that the accused just carried the gun innocently.

The degree of participation of no. 2 that he was not the person who actually shot the deceased, and that he was from a beer drink taken together may be considered as constituting extenuating circumstances even though it presented in argument by counsel not supported by accused evidence.

After reading the decisions R.V. TAYLOR L948 4 SA 702 AT PAGE 705; R.V. MLARADZO 1966 2 SA 702, S V NDLOVU 2 692 AT PAGES 695-696 and S V Sebeko 1968 1 SA 495....

I have come to the conclusion that there are no extenuating circumstances in respect of no. 1 and reluctantly found extenuating circumstances in respect of no. 2.


A.F.M. THWALA

JUDGE