IN THE KWAZULU NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO. AR 179/06

In the matter between:

LANGA MKHIZE APPELLANT

and

THE STATE RESPONDENT

APPEAL JUDGMENT Delivered on 05 August 2009

SWAIN J

[1] The appellant appeals against his conviction on one count of murder, one count of attempted murder, two counts of kidnapping and one count of common assault, leave having been granted by Moleko J, who confirmed the conviction of the Regional Court, the matter having been referred to the learned Judge for sentencing in terms of Section 52 (1) (b) of the Criminal Law Amendment Act No. 105 of 1997.

[2] The appellant was sentenced to ten years' imprisonment for murder, two years of which were suspended for five years on conditions, five years in respect of the count of attempted murder and one of the counts of kidnapping (taken together for the purposes of sentence) three years in respect of the other count of kidnapping and a fine of R300.00 in respect of the count of common assault. The appellant was therefore sentenced to an effective term of eight years' imprisonment, against which no application for leave to appeal was lodged.

[3] The co-accused of the appellant did not challenge his conviction on the counts of murder, attempted murder and kidnapping for which he was sentenced to an effective term of imprisonment of six years.

[4] What is not disputed by the appellant is that on 29 December 2003, he together with his co-accused and one Mfunwa Khuzwayo, travelled to the homes of Siyabonga Mkhize (the complainant on the count of attempted murder) and Thembowake Mkhize (the deceased on the murder count) and caused them both to accompany the appellant and his companions, firstly to the homestead of the said Mfunwa Khuzwayo, and thereafter to the homestead of one Sihle. Whether Siyabonga Mkhize and the deceased accompanied the appellant voluntarily, or were compelled to do so, forms the subject matter of the two counts of kidnapping. The object of the exercise was to arrest Siyabonga Mkhize and the deceased, as suspects in an

incident where two female teachers were robbed and one of them was raped. This incident occurred at the homestead of Mfunwa Khuzwayo and they were taken there with the purpose of questioning them both to ascertain exactly what roles they had each performed in this incident.

[5] The crucial issue is whether the appellant and his co-accused beat the deceased and Siyabonga to extract this information, as contended for by the State, or whether the deceased and Siyabonga were beaten by members of the community at Sihle's home, in the absence of the appellant, as contended for by the appellant.

[6] The main argument advanced by Mr. Manikam, who appeared for the appellant, was that the evidence of Siyabonga Mkhize as to the assault by the appellant upon the deceased and himself, was incorrectly relied upon by the Magistrate, as he was a single witness in respect of most of the duration of the assault. Mr. Manikam also drew our attention to what he submitted were aspects of his evidence which militated against the Magistrate placing reliance upon his evidence.

[7] What this argument overlooks is that the version of the appellant is that at no stage did he assault either the deceased, or Siyabonga. The evidence of Siyabonga that the appellant assaulted the

deceased was supported by the evidence of Sizeni Mkhize (the mother of the deceased), Mqedeni Mkhize (the father of the deceased) as well as Thulisile Mkhize (the sister of the deceased). The fact that they were not present during the course of the entire assault matters not. Their evidence contradicts the evidence of the appellant that he never assaulted the deceased at any stage.

[8] Mr. Manikam has drawn our attention to certain shortcomings in the evidence of the family members of the deceased, which we have carefully considered. Due regard being paid to these aspects, the only basis upon which their evidence that the appellant assaulted the deceased can be rejected in its entirety, is if it is found that they have conspired to falsely implicate the appellant. The evidence of the appellant was that certain members of the community, whom he named, were responsible for the death of the deceased and the attempted murder of Siyabonga. This was denied by all of these witnesses. The question therefore has to be posed, why would these witnesses falsely implicate the appellant in the death of the deceased when the true perpetrators of the crime were known? Mqedeni Mkhize in fact stated that there were members of the community present when the appellant was assaulting the deceased, who were crying and asking "why is the child being killed". A further question which has to be posed is why would these witnesses, who were present when the members of the community were at the scene, seek to falsely implicate the appellant, when on the appellant's version he was not even there and these witnesses would have seen the

members of the community named by the appellant, assaulting the deceased?

[9] I find it grossly improbable that these witnesses, who on the appellant's version must have been aware of the identity of the perpetrators of the assault upon the deceased and Siyabonga, would seek to shield these individuals and falsely implicate the appellant. When I asked Mr. Manikam what motive these witnesses could possibly have to falsely implicate the appellant, he submitted that it was because the appellant had arrested the deceased and Siyabonga and was therefore responsible for what ultimately occurred. I do not regard this explanation as plausible, particularly as it offers no reason why they would be prepared to allow the guilty parties to go free at the expense of the innocent appellant.

[10] Weighed against the evidence of these witnesses are a number of glaring improbabilities in the evidence of the appellant.

[11] The appellant agreed that as Chairperson of the Community Policing Forum he was going to do everything in his power to make sure that the people who committed these crimes were brought to book, he was unhappy that the charges were withdrawn against the particular persons involved and he together with the victims, felt passionately about making sure that these people got what they

deserved. He agreed that he, as Chairperson, was going to ensure that the persons who were suspected of committing these crimes were brought to book. He also said that Mfunwa Khuzwayo was told by the police to go and look for the suspects themselves when they told the police who the suspects were. What was expected of him was to "get" the suspects and take them to the police station, but he agreed that he did not possess the power to arrest individuals.

[12] When asked why he did not take the suspects to the police station immediately after he had "arrested" them, but proceeded instead to the house of Mfunwa Khuzwayo where the incident occurred, he said that they wanted to be sure of what had happened and that their explanation as to what role each had played, accorded with what the victims had to say. According to the appellant, both suspects simply agreed they had committed the offences complained of.

[13] According to Mfunwa Khuzwayo however, the reason why the suspects were taken to his home, was because one of them was denying the allegation and one of them was admitting the allegation. He only wanted to call the police when he was sure whether they had the "wrong people or right people". He also said they did not immediately take them to the police station "because the police said they can't arrest people if they have no physical evidence so that is why we didn't call the police by that time we wanted to take them to the place where the goods were kept, the

stolen goods were kept, then call the police in order to tell them that here are the suspects and the stolen goods".

[14] I regard it as grossly improbable that the suspects would simple confess to the crime without any compulsion, particularly as Mfunwa Khuzwayo contradicts the appellant's evidence in so far as he says that one of the suspects denied the allegations. I also regard it as grossly improbable that the purpose in conveying the suspects to the scene of the incident, was simply to ascertain the roles each of the suspects had played. The object was obviously to get the suspects to reveal the existence of physical evidence because without such evidence, according to Mfunwa Khuzwayo, the police would not arrest them.

[15] The appellant's assertion that neither of the suspects were assaulted at Khuzwayo's house is contradicted by the evidence of accused No. 2, who stated that he heard the sound of somebody crying within the house and he thought somebody was being hit. He entered the house and saw Mfunwa Khuyzwayo standing and the two suspects lying on the floor. Appellant was present in the house. Thereafter he saw the appellant carrying a stick, which the appellant said had been used during the incident when the teachers were raped and robbed. When it was put to accused No. 2 that the evidence of the appellant was that nothing occurred at the time he said there was screaming, his response was that the appellant was

lying. The evidence of accused No. 2 must be approached with caution because it is clear that he attempted to minimise both his role and that of the appellant in the proceedings. However, as regards the events at Khuzwayo's house, his evidence that the suspects were assaulted there is consistent with the evidence of Thulisile Mkhize. Accused No. 2 confirms her evidence that she arrived at the house. Thulisile stated that she saw accused No. 2 outside the house and then saw the appellant inside the house, assaulting the deceased by striking him on the head with a stick. The deceased was crying at the time.

[16] As pointed out above, the version of the appellant is that the deceased and Siyabonga were assaulted by members of the community in his absence. His absence was caused by the owner of the vehicle he had used to convey the suspects, requesting its return. The owner did this by sending a child to Mfunwa Khuzwayo's home asking for the return of the vehicle. Accused No. 2 however denied that any child came to the house because as he put it "but it is me who was outside who was supposed to see everything" and agreed that evidence to the contrary would be lies. He also disputed the evidence of the appellant that the appellant left the suspects at Sihle's house and immediately left. According to accused No. 2 the appellant also alighted and was part of the discussion with Sihle's mother and spoke to members of the community who were present. Accused No. 2 denied however that the suspects were assaulted at Sihle's home and stated that they were only assaulted at Khuzwayo's house. If

accused No. 2 wished to implicate the appellant he could quite easily have alleged he saw the appellant assaulting the suspects at Sihle's house, as attested to by the other witnesses. Why would he falsely wish to place the appellant on the scene at Sihle's house, and deny that any child arrived at Khuzwayo's house to cause appellant to leave Sihle's house, and yet deny that anybody, including the appellant, assaulted the suspects in his presence at Sihle's house? In my view, the evidence of accused No. 2 in this regard has the ring of truth.

[17] The evidence of Inspector Dludla that the appellant was threatening people present at the scene that if they talked to the Inspector they would have a problem, I regard as of significance. Why would the appellant behave in such a fashion unless he had something to hide? Although the appellant denied behaving in such a manner, and said that Inspector Dludla was lying, he never suggested any reason why he would do so. Asked when giving evidence in chief to substantiate why the Inspector was not telling the truth, he simply said that he, i.e. the appellant, was at another house when the police van arrived and he then "came down".

[18] Of great significance is the appellant's attempt to explain why he never gave the police the names of the individuals, whom he saw were armed with sticks standing in the vicinity when he returned and found the suspects had been assaulted. The appellant said the

police never asked him about this and then said that it never occurred to him that they were involved in the assault. It is quite clear the appellant was dishonest in this regard.

[19] When all of the evidence is considered, I am satisfied that the State proved beyond a reasonable doubt, that the appellant was party to a common purpose with accused No. 2 and Mfunwa Khuzwayo to kidnap the deceased and Siyabonga, and assault them to obtain evidence of their involvement in the rape and robbery of the teachers. In the course of executing this common purpose the deceased was killed and Siyabonga was severely assaulted. It is unnecessary to determine who struck the fatal blows because it is trite that the one perpetrator's act can be attributed to the other members of the common purpose. It is clear that the assault upon both the deceased and Siyabonga was prolonged and severe. In my view, the appellant foresaw the possibility that the acts of the participants with whom he associated himself, as well as the assault he perpetrated upon the deceased and Siyabonga, may result in death and reconciled himself to that possibility. The appellant was therefore correctly convicted of the murder of the deceased and the attempted murder of Siyabonga.

[20] As regards the conviction on count 5, namely common assault perpetrated by the appellant on Thulisile Mkhize, I am satisfied that the appellant was correctly convicted. In the light of the finding that he was present at Sihle's house, where Thulisile came and tried to

speak to the deceased, and that the appellant was armed with the same stick that she had seen in his possession at Khuzwayo's house, I have no hesitation in rejecting the appellant's denial of this assault as not being reasonably possibly true.

[21] I would therefore propose that the appeal against the appellant's conviction be dismissed.

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Swain J

I agree

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Hollis A J

I agree and it is so ordered

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Nicholson J

Appearances/…

Appearances:

Counsel for the Appellant	:	Adv. M. Manikam
Instructed by	:	David & Co. Stanger
Counsel for the Respondent	:	Adv. M. G. Chetty
Instructed by	:	Director of Public Prosecutions Pietermaritzburg
Date of Hearing of Appeal	:	28 July 2009
Date of Judgment		05 August 2009