IN THE HIGH COURT OF SWAZILAND

CRIM.CASE NO. 22/98

In the matter between

REX

VS

THOKOZANI GENGENYANE MAVUSO

Coram S.B. MAPHALALA - J

For the Crown MISS. LANGWENYA

For the Defence MR. MAMBA

JUDGEMENT

(23/11/98)

On this indictment Thokozani Gengenyane Mavuso is charged with murdering an old woman Bester Hlophe at Mantambe on the 26th August 1997 according to the first count preferred against the accused. On the second count the said accused is charged with the crime of arson of having burnt the property of the said Bester Hlophe by setting on fire and thereby damage two houses on the same day. When the indictment was put to the accused he pleaded not guilty to both counts.

According to the post-mortem report the deceased died as a result of multiple stab wounds. There is also clear evidence from the pictures taken by the scene of crime police officers that the two huts were gutted by fire.

The crown called six witnesses to prove its case. The evidence of Dr. Rammohan the police pathologist who performed a post-mortem examination and compiled a report of his findings on the deceased was entered by consent. The evidence of the identifying witness Jeremiah Hlophe was also entered by consent. So is the evidence of Norah Busisiwe Hlophe whose evidence according to the summary of evidence is that she was the deceased daughter-in-law. She was going to tell the court that on the 26th August 1997, she was in her house together with her husband Elliot Hlophe (who was introduced as PW3) when she heard a loud bang at the deceased hut. Her husband went out of the house to inquire and she followed him. Outside he saw a huge fire and two huts burning. The deceased was shouting and saying "I saw you Mavuso boy, you are killing me for nothing because the person I am dying for is not here". After uttering these words, the deceased died. Outside the hut there were

people who were calling each other "Joe". This witness did not see these people. The estimated value of the property that was destroyed in the two huts was E1 5,000-00.

The crown then called PW1 Ncedile Hlophe who told the court that at about 8.00pm on the 26th August 1997 she was inside the house together with her grandmother Bester Hlophe and Simangele Phindile Hlophe (PW2). They saw fire and their grandmother took out some water and attempted to put out the fire. When the deceased went out of the hut she was hit with an object which she did not see and she bled. When her grandmother went out she was raising an alarm. PW1 was able to get out of the house when the fire was burning ad she ran away. She told the court that she knew who set the house on fire, it

was the accused. They could see the accused peeping through the window; he was wearing a white headgear. The deceased called him out and said that there she could see him he was a Mavuso. She ran outside and raised an alarm and subsequently the matter was reported to the police.

The crown then called PW2 Simangele Phindile Hlophe who told the court that at about 8.00pm on the 26th August 1997 they were inside a hut together with PW1 and the deceased. They saw that the hut was on fire and they then raised an alarm. The deceased opened the door and went out, someone hit her. Before that they heard footsteps of people running around outside. They saw one person who was peeping through the window. She saw that it was the accused who was wearing something white in his head. She saw his top part of his body. The accused stabbed the deceased with a spear on the cheek. Her grandmother said "I can see you, you are a Mavuso boy". She then came out with PW1 and ran away. They left the deceased inside the house. Two huts were burnt. After the incident she did not see the accused. The matter was reported to the police and she also recorded a statement with the police. However, it should be noted that after the defence has completed its cross examination, the crown applied to invoke Section 273 of the Criminal Procedure and Evidence Act (as amended) No. 37 of 1938 to have this witness impeached. It became apparent that this witness when questioned by the crown was not worthy of credit as she lied through her teeth, what she told the court in chief was materially different from what she told the police in her statement.

The crown called PW3 Norah Hlophe whose evidence was entered by consent as I have earlier on in the judgement pointed out.

The crown then called PW4 Elliot Hlophe whose evidence is materially similar to that of his wife PW3 Nora Hlophe. He was not cross-examined by the defence.

The crown then called PW5 Constable Tutu H. Dlamini who told the court that on the 27th August 1997 at about 0130 hrs he went to the scene of the crime. He observed the scene and the body of the deceased. He then took the body of the deceased to the mortuary. There was a twenty litre empty tin, which was smelling petrol and a small green plastic container also smelling of petrol next to the huts. He took these items as exhibits. On the 5th September 1997, he introduced himself to the accused who was at his homestead. He arrested the accused and cautioned him in accordance with the Judge's Rules and questioned him about this matter. The accused denied everything concerning this offence.

The crown then called PW6 2600 Sergeant D. Dube who is the scene of crime officer who told the court that on the 27th August 1997, he took pictures of the scene of crime.

The crown then closed its case where Mr. Mamba attempted to launch an application in terms of Section 174 (4) of the Criminal Procedure and Evidence Act (as amended) and after full arguments on both sides he abandoned it and called his client to his defence.

Mr. Mamba then called the accused to the witness stand where he denied liability in this case. That what PW1 said about him is not true, as he was not at the scene of crime at the material time. He was cross-examined at length by the crown.

The court then entertained submissions from both sides. The crown submits that the accused be found guilty as charged on the basis of the evidence of PW1 and PW4. PW1 stated that on the night in question she was asleep in her hut together with the deceased and they were woken up by the noise of stones pelting the windows. She saw the accused peeping through the window and at that time the house was already on fire. The evidence of PW1 in law is sufficient. It is the evidence of a competent witness in terms of Section 236 of The Criminal Procedure and Evidence Act (as amended). Miss Langwenya further directed the court's attention to the case of 5 vs Mokoena 1932 N. P. D. 79 at page 80 where Devillers J P stated that the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by Section 284 of Act 31 of 1917. This Section being in accordance with our Section 236 of our penal code. He proceeded to say that the evidence should be relied on when it is

clear and satisfactory in all material respects. It is for the court in the case in casu to look for the truth in the evidence of PW1. Why would these witnesses come to court to give such damning evidence? The accused failed to explain why the evidence of PW1 implicated him because it is the truth. The story by PW1 is confirmed by that of PW4 who said that when he arrived at the homestead of PW1 and PW2 PW1 told him about the person who burnt down the huts and assaulted the deceased.

On the other hand Mr. Mamba for the accused contends that the crown has missed the point. The issue in this case is whether or not the accused was one of the attackers that fateful night. The only evidence that links him with the commission of the offence is that of PW1. The accused does not bear the onus to explain away the evidence of PW1. He does not even have to give a reason why a child of 13 years (PW1) should lie against him. The evidence of young persons should be taken with caution. The court should look for some other material, which link the accused with the commission of the offence. She is an unsophisticated girl from a rural background. She said before coming to court to give evidence she had the opportunity to discuss the matter with her mother and PW2. She said it was after her grandmother (the deceased) had said, "you are Mavuso" that she saw that it was the accused. On her own she did not know who the attacker was. She said she was not able to see the whole body. She said the head including the assailant's ears were covered. The person who appeared on the window was disguised. No credible identification could have been made under those circumstances. PW1 tried to tell the court that she had about 30 minutes to look at the person. But according to Mr. Mamba this is fanciful. There is no cogent and reliable evidence from this witness.

Mr. Mamba submitted that it is trite law that there should be an exercise of caution by the court in evidence of identification. Why did the police not act on her evidence and that of PW2 there and there and wait for two weeks (refers to the case of R vs Masemang 1950 (2) S.A. 488 (AD) at page 493). Finally that the accused should be given the benefit of the doubt in this case

These are the issues before me. I have also availed myself to the legal authorities cited by counsel. It is clear from the evidence before court that this was a very gruesome attack on an old defenceless woman at night. She was not only brutally stabbed a number of times; her huts were burnt into cinders. Her grandchildren she was sleeping with that night were traumatized and had to run away for safety leaving the old woman to die. That as it may, the court is to determine whether or not the accused is connected with the death of the deceased. It is common ground that the court is to rely on the evidence of a single witness that of PW1 who was 13 years old at the time of the incident. PW1 told the court that she saw that it was the accused who was peeping through the window but she could only see his upper body and that his head was covered in a white headgear. She said under cross-examination that she saw that it was the accused after the deceased had said she could see that it was a Mavuso boy. She further told the court that she was able to observe the accused for 30 minutes peeping through the window.

In our law young children are competent witnesses if the judge considers that they are old enough to know what it means to tell the truth, but it has frequently been emphasized that their evidence should be scrutinized with great care. The danger is not only that children are highly imaginative but also that their story may be the product of suggestion by others. In the case in casu we are dealing with the evidence of a 13-year-old girl. We are also dealing with the evidence of identification. It is trite law that it is generally recognized that evidence of identification based upon a witness's recollection of a person's appearance is dangerously unreliable and should be approached with caution. The Appellate Division in S vs Mthetwa 1972 (3) S.A. 266 laid down as follows:

"Because of the failability of human observation, evidence of identification is approached by the courts with caution. It is not enough for the identification witness to be honest; reliability of his observation must also be tested. This depends on various factors, such as lighting visibility, and eyesight, the proximity of the witness, his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused face, voice, built, gait and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is exhaustive. These factors, or such of them as are applicable in a

particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities" (per Holmes J A)".

This is the legal guideline the court has to follow in testing the evidence of PW1. It appears to me as I have earlier mentioned that PW1 was able to say it was the accused after this fact was suggested to her by the deceased utterances. She says so in cross-examination. To me it appears as if there was an element of suggestibility which

cannot be wished away. She further tells the court that she observed the accused for 30 minutes peeping through the window. To me this is not only fanciful but suggest that PWl's orientation as to time is highly questionable. She told the court that she only saw the upper side of the accused body and the head was covered in a white headgear. She further tells the court that she made a statement to the police that very night. However, what is curious in this case is that the accused is confronted by the police 14 days after the accident. Does this mean that the police officers investigating this case did not believe PW1, as one would expect them to follow the scent while it was still fresh (so to speak)? For the reasons I have advanced above I agree with the submissions made by Mr. Mamba when he was applying for accused discharge in terms of Section 174 (4) of The Criminal Procedure and Evidence Act (as amended) and at the close of the defence case that it would be highly dangerous to convict on the single evidence of this witness which is peppered with a number of improbabilities.

In the premise I give the accused the benefit of the doubt and he is found not guilty on both counts and acquitted forthwith.

S.B. MAPHALALA

JUDGE