IN THE HIGH COURT OF SWAZILAND

CASE NO.184/98

In the matter between:

REX

VS

ELIZABETH MATIMBA
JOYCE NTOMBIFUTHI MDLULI

CORAM	:	**MASUKU J.**
For the Crown	:	**MRS M. DLAMINI**
For the Accused	:	**MR K.N.M. VILAKATI**

RULING ON APPLICATION AT CLOSE OF CROWN'S CASE
22/5/00

The above accused persons are charged with abortion. The indictment alleges that either one or both of them and acting in common purpose did wrongfully and unlawfully administer a certain drug to Fikile Matimba, a female residing at Malindza, at or near Mbabane Government Hospital Nurses Home, Hhohho region, the said Fikile Matimba then pregnant with a living foetus, with intent thereby to procure the miscarriage of the said Fikile Matimba and as a result of the administration of the said drug cause the death of the said foetus and its expulsion from the body of the said Fikile Matimba.

The Crown led the evidence of ten witnesses to prove its case. At the close of the Crown's case, Mr Vilakati, guided by a decision of this Court, in **REX v JUSTICE TEYA MAVIMBELA CRIM.CASE NO. 115/98** (unreported by Masuku J.) which relates in part to the duties of the defence Counsel at this stage of the proceedings, conceded that the Crown had succeeded in establishing a *prima facie* case against

Accused 1, thereby requiring him to call Accused 1 to her defence. With regard to Accused 2, Mr Vilakati was of the view that the Crown had failed in establishing a *prima facie* case against her.

In support of this application, Mr Vilakati raised the following arguments. First that the Crown had failed to prove common purpose between the accused persons. Second, that the evidence against her was given by Fikile Matimba (PW 7) to members of the Community Police in her absence. He argued that such evidence was inconclusive of whether it was the said Accused person who was referred to by PW 7 as Sister Mdluli.

Third, that the Crown impeached its own witness, PW 7 and therefor the evidence given by PW 7 against Accused 2 is not credible and may not be properly relied on by this Court. Mr Vilakati further reasoned that the evidence by PW 6, 2337 Sergeant Vusi Dlamini did not take the matter further because it was his evidence that he interrogated the Accused 1 and PW 7 and as a result of the interrogation, he went to the Nurses home, where he was told that she was at work at the Government Hospital to where he went and found A2 in the office. He took Accused 2 to the Police Station for questioning and later released her. It is not clear to the Court, Mr Vilakati argued, what Accused 1 and PW 7 said to the Police Officer as this was not disclosed to the Court. Mrs Dlamini for the Crown strenuously opposed this application.

Before considering the success or otherwise of this application, I find it apposite to briefly outline the relevant portions of the evidence led. PW 1 was Thamsanqa Gwebu PW 7's boyfriend, who testified that PW 7 told him that she was pregnant and further handed in letters written to him by PW 7 in which she was expressing her helplessness and frustration at the fact that her mother, Accused 1, was coercing her to commit an abortion. I shall return to these letters later.

PW 2 was Robert Zwane, the leader of the Malindza Community Police. His evidence was that sometime in May, 1998, PW 1's father complained regarding a misunderstanding between his family and Accused 1's family. As a result, a meeting involving both families and the Community Police was convened at the Gwebu homestead. The bone of contention appeared to centre around PW 1 impregnating PW 7, which the latter's family,

particularly Accused 1 strongly objected to. It was established during that meeting that PW 7's pregnancy had disappeared. PW 7 was called amongst other people to explain.

PW 7 told the members of the Community Police that she never intended to have her pregnancy terminated but her mother told her that her future had been ruined by the pregnancy and asked her to agree to submit to an abortion. Accused 1 further told her that she would take PW 7 to a Mdluli nurse in Mbabane who would procure the abortion. PW 7 further told the gathering that she was first introduced to the nurse and later went alone to the nurse who administered an injection which later led to the expulsion of the foetus, which foetus PW 7 took back home to her mother.

There is also the evidence of PW 6, the officer who arrested Accused 2. According to his evidence, he received a docket from 677 Inspector Simon Simelane (PW 5), together with two suspects i.e. Accused 1 and PW 7. After cautioning the two in terms of the Judges' Rules, it was his evidence that he made further investigations which led him to the Mbabane Government Hospital where he introduced himself to Accused 2, cautioned her in terms of the Judges' Rules, arrested her and took her to the Police Station where he charged her with committing an abortion.

Fikile Matimba (PW 7), who made a statement to the Royal Swaziland Police (RSP), was subsequently declared a hostile witness having confirmed that she recorded the statement in question. In that statement, which she read out in Court, she gave details of how the abortion was procured by Accused 2 at the Nurses Home in the Government Hospital. It somewhat confirms the evidence given by PW 2 regarding what PW 7 told the gathering at the Gwebu homestead. PW 7 however denied knowing Accused 2 when cross examined by the Crown after having been declared a hostile witness. Earlier on, before being so declared, she confirmed having written the letters to PW 1.

Having outlined the highlights of the evidence against Accused 2, I find it apposite to consider the legal propositions applicable at this stage.

Section 174 (4) of the Criminal Procedure and Evidence Act 67/1938 (as amended) and under which this application has been moved, provides as follows:-

> *"If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged or any other offence of which he might be convicted thereon, it may acquit and discharge him."*

In the celebrated case of **THE KING v DUNCAN MAGAGULA AND 10 OTHERS CRIM. CASE NO.43/96** (unreported judgement by Dunn J. (as he then was), the test to be applied by the Court in considering the application under the said Section was stated with absolute clarity in the following terms at page 8:-

> *"This section is similar in effect to section 174 of the South African Criminal Procedure, Act 51 of 1977. The test to be applied has been stated as being whether, there is evidence on which a reasonable man acting carefully might convict* ***(R v SIKUMBA 1955 (3) SA 125; R v AUGUSTUS 1958 (1) SA 75,*** *not should convict* ***(GASCOYNE v PAUL and HUNTER 1917 TPD 170; R v SHEIN 1925 AD 6).***"

From the test so lucidly set out, it is clear that the Legislative nomenclature grants the trial Court discretion to decide, on the attendant facts of any matter, whether or not to grant the discharge. Like discretion in other cases, this must be judiciously exercised.

A St Q Skeen, in an article entitled "The Decision to Discharge An Accused at The Conclusion of the State Case: A Critical Analysis, South African Law Journal Page 286 at 287, considered the implications of the above Section as follows:-

> *"The words ' no evidence' have been interpreted by the Courts to mean no evidence upon which a reasonable man might convict. The issue is whether a reasonable man might convict in the absence of contrary evidence from the defence and not what ought a reasonable man to do. If a prima facie case is established the accused runs the risk of being convicted if he offers no evidence, but it does not necessarily mean that if he fails to offer evidence the prima facie case will then become a case proved beyond a reasonable doubt. This may or may not take place. It sometimes happens that a court, after refusing an application for discharge at the conclusion of the State case, will acquit the accused where he closes his case without leading any evidence.*

will acquit the accused where he closes his case without leading any evidence. In other words, what a reasonable man might do does not equate with what a reasonable man ought to do. The test at the conclusion of the whole case is whether the state has proved the guilt of the accused beyond a reasonable doubt. The issue as to whether there is evidence on which a reasonable man may convict is a matter solely within the opinion of the judicial officer and may not be questioned on appeal."

I whole heartedly embrace these remarks. What I must now consider, acting carefully, is whether it can be said that there is no evidence in this case that the accused committed the offence charged or any other offence of which she might be convicted. In answering this question, I propose to address the arguments raised by Mr Vilakati in support of the application.

The first argument was that the Crown failed to prove common purpose in this matter. The basis for this contention was unfortunately not pursued. In his last judgement, in the case of ***REX* vs JUSTICE MAGAGULA AND 6 OTHERS CRIM. CASE NO. 75/98,** at page 16, Dunn J. cited remarks of Tindall J.A. in **REX vs DUMA AND ANOTHER 1945 AD 410 at 415**, where Justice Tindall propounded the law relating to common purpose as follows:-

"The liability of persons who assist in the carrying out of a common criminal purpose was considered in the case of ***REX vs GUNSWORTHY AND OTHERS.***

In my opinion the principles applicable were formulated with substantial accuracy by Dove Wilson J.P. in the following terms:-

Where two or more persons combined in an undertaking for an illegal purpose each one of them is liable for anything done by the other or the others of the combination in the furtherance of their object." If what was done was what they knew, or ought to have known would be the probable result of their endeavouring to achieve their object. If on the other hand what is done is something which cannot be regarded as naturally and reasonably incidental to the attainment of the object of the legal

combination then the law does not regard those who are not themselves personally responsible for the act as being liable. But if what is done is what anybody engaging in this illegal combination would naturally or ought naturally to know would the obvious and probable result of what they were doing then all are responsible."

In terms of this dictum, I am of the view that common purpose was proved from the evidence led and this will become apparent as consideration of the evidence led unfolds regarding the other arguments. In particular, a clear inference is to be drawn that Accused 1, burning with vaulting ambition to terminate PW 7's pregnancy, went to Mbabane Government Hospital where she engaged Accused 2's services. Accused 2 there administered drugs to PW 7, which eventually led to the expulsion of the foetus from PW 7's uterus.

In my view, it cannot be said that no evidence was led against Accused 2 and on which a reasonable man might convict. Firstly, there is the evidence of PW 2 Robert Zwane, the important aspects of which were highlighted above. PW 2 stated that PW 7 identified the Nurse as Sister Mdluli of the Mbabane Government Hospital. This was not challenged by the defence. To substantiate this point, I find it apposite to make excerpts from PW 2's cross-examination by Mr Vilakati as recorded in my notes:-

Q: The rest of the information for example about the nurse, you obtained from Fikile

A: Yes.

Q: This includes the name of the alleged nurse

A: Yes and Accused 1 confirmed it.

This evidence, which linked Accused 2 to the commission of the offence was not challenged by the defence in at least three respects. Firstly, it was never denied that the meeting in question was held. Secondly, the identity of the nurse mentioned by PW 2 as disclosed by PW 7 was not denied, neither was the place of the said nurse's residence and

work denied. Thirdly, it was never put to PW 2 that Accused 1 never denied confirming the identity of the nurse.

Secondly, in the letter written by PW 7 to PW 1 particularly, Exhibit "B", dated 11th May, 1998, PW 7 informs PW 1 that Accused 1 wants the pregnancy to be terminated. She further informs him that Accused 1 gave her some medicine to drink which she (PW 7) is refusing to take. She further records that Accused 1 was telling her that she (Accused 1) was looking for a Doctor. Lastly, she states in that letter if she continues to stay at her home, Accused 1 will end up prevailing in her intentions and states that as she is writing the letter, Accused 1 is in Mbabane and she (PW 7) does not know what Accused 1 has gone there to do.

In Exhibit 'C', dated 17th May, 1998, PW 7 informs PW 1 *inter alia*; that on that morning, Accused 1 was forcing her to go to Mbabane again. She mentions further that on the Wednesday, she (PW 7) had refused to succumb, clearly to an abortion. It is apparent that PW 7 went to Mbabane concerning terminating the pregnancy on at least two occasions. This is confirmed by her statement recorded before the Police in Manzini. In that statement, PW 7 described the intricate details of when, where, how and by whom the pregnancy was terminated and further states at whose behest it was carried out. She mentions Accused No.2 and her place of work and residence by name in that statement.

Whilst it may be true that she was declared a hostile witness, it is not true that her evidence must be expunged from the record.

In the case of **DUNCAN MAGAGULA AND 10 OTHERS** (supra), at page 6, Dunn J. dealt with the approach to be adopted by the Courts in Swaziland where a witness has made an earlier inconsistent statement, which is governed by the provisions of Section 273 of the Act. He cited with approval the summation by Isaacs J.A. in **MBULAWA JOHN DLAMINI** and **ANOTHER vs R 1982 – 86 SLR 133**, which is as follows:-

> *"(3) If the witness, (i.e. one declared hostile) however, now adopts what he had said in his prior statement and repeats it in court, that new evidence is admissible, but the witness will now have contradicted himself, and the weight to be attached either of his two versions is a matter for the court to decide. In general, the*

evidence of such a witness will be rejected, but this is not an absolute rule." *(my own emphasis).*

In *casu*, PW 7 recorded a statement with the Police, which is confirmed in material respects by the evidence given by PW 2, which he states is what PW 7 told the gathering at the Gwebu homestead. In both, she implicates both accused persons. When she gave her evidence, having been declared hostile, she made a statement under oath, which sought to exculpate both accused persons and to render the expulsion of the foetus one occasioned by natural but unfortunate phenomena. It is now my duty to decide, whether to reject her evidence *in toto* or choose which version to believe. In the latter case, I also have to decide what weight ought to be attached thereto. In this case, I have no hesitation in accepting the contents of the statement made to the Police as true. This is because it tends to confirm what she told the meeting as recounted by Zwane and is further confirmed in relation to Accused 1 going to Mbabane which is a cause for concern to PW 7 by Exhibit "B". Exhibit "C" confirms that PW 7 went to Mbabane twice for purposes of procuring the abortion, which is also recorded in the statement. Furthermore, the PW 7's demeanor, when cross examined by the Crown was indescribably declaring one story, that PW 7's version in Court, insofar as it detracted from the clear and unambiguous contents of Exhibits "B" and "C" and the statement, all written under her hand was nothing but an unmitigated lie. I will deal with this in greater detail in the main judgement.

Thirdly, there is the evidence of PW 6, who stated that he was handed Accused 1 and PW 7 and the docket by PW 5, who also confirmed these facts. He stated that having interrogated the two suspects, he got information which led him to a particular house at the Nurses Home in the Government Hospital Compound where he had gone to look for a Sister Mdluli. At that house, he was told that the Sister Mdluli is at work in the hospital. This is where and how he arrested Accused 2. PW 6 was not cross examined by the defence. It was not suggested to him for instance that there was another Sister Mdluli in the hospital or that Accused 2 denied having been involved at all in the commission of the crime to PW 6.

It cannot be said there is no evidence linking Accused 2 to the offence merely because PW 6 did not disclose to the Court what he was told by Accused 1 and PW 7 as contents

of that information are clearly inadmissible hearsay evidence. It is however clear that PW 6 obtained information which led him to reasonably suspect that Accused 2 was involved in the offence, hence her arrest. The fact that Accused 2 was not at Malindza to deny the allegation made against her by PW 7 and Accused 2 as recorded by PW 2 is not any or sound basis that there is no evidence linking her to the offence.

Lastly, and by way of observation, the Court being mindful that there is no onus on an accused person to prove his or her own innocence, no defence has been put to the Crown witnesses which would exculpate Accused 2 because the evidence given by PW 7 when questioned by Mr Vilakati was proved to be palpably false. PW 7's story, which is false as shown by other evidence that I need not traverse here, is that she felt pain in her uterus and when she went to urinate, blood came out together with the foetus. She then called Accused 1 to attend her. Accused 1 came with one Gogo Sukati and they washed PW 7 and took the foetus and disposed of it in her absence. Gogo Sukati subsequently gave evidence and featured as PW 10. She denied having been party to what PW 7 alleged. She said that event never happened. Under cross-examination, it was never suggested to her that her denial above recorded was false.

Had PW 7's evidence in this regard been true, it would have meant that the abortion occurred at Malindza. This would have led to the conclusion that the Crown had failed to link Accused 2 to the offence as it would mean that no abortion was carried out in Mbabane as alleged in the charge sheet and PW 2's (Zwane) evidence would have been rendered a fiction of a fertile imagination, if not downright falsity.

In the circumstances, I am of the view that this application ought to fail. From the foregoing, it cannot be said that no evidence has been led by the Crown on which a reasonable man might convict. Accused 2, like Accused 1 must be called to her defence and it is so ordered.

T.S. MASUKU
JUDGE