IN THE APPEAL COURT OF SWAZILAND

In the Appeal of APPEAL NO. 11/1981

MOSES GININDZA (Appellant)

vs.

REGEM (Respondent)

CORAM: MAISELS J.P., DENDY YOUNG J.A. ISAACS J.A.

FOR CROWN: MR. KRUPAVARAM

FOR DEFENCE: MR. LUKHELE.

JUDGMENT

(Delivered on 26 Jan. 1981)

Dendy Young J.A.

The Appellant was convicted of the crime of Culpable Homicide and sentenced to a fine of E100 or 6 months imprisonment.

After argument the Appeal was dismissed by a Majority and the Court indicated that reasons would be filed later. The following are my reasons for taking the view that the appeal should succeed.

The charge arose out of a collision which occurred on the 24th July 1980 upon the Balegane and Mayiwane road in Mkhuzweni area, as a result of which a 16 year old girl Thandie Maseko was knocked down by a truck driven by Appellant. The girl sustained a broken neck and died instantly.

The Crown alleged negligent driving on the part of the Appellant in -

(1) travelling at an excessive speed and

For the second appellant it was urged that he was overawed and acted in accordance with the orders and wishes of the Chief. He was a member of the Inner Council and also a man of authority. Conditions woud l indeed be chaotic in any country if a person were able to commit a murder, particularly of the kind in question, and escape the just penalty for doing so, if the excuse given by the second appellant were to be held to be valid. I dismiss without any hisitation the submissions on his behalf in connection with the finding that there were no extenuating circumstances.

With regard to the third appellants who was fortunate enough to escape the death penalty, it was said that the sentence of fifteen years imprisonment was too severe. Reliance was placed upon the fact that the Court of Appeal had set aside the death penalty imposed upon the accomplice for the same murder and had substituted therefor a sentence of eight years imprisonment. This seems to me to be entirely irrelevant. The question to be determined is whether the conduct of the third appellant was of such a nature as to merit the sentence of imprisonment imposed on him and whether there are any recognised legal grounds upon which this Court could properly interfere with the sesntence imposed by the trial Court. In my opinion there are none. It is not inappropriate to mention that the learned Chief Justice sat with two assessors and although the decision was his he stated that he was deeply indebted to them for the very great assistance that they had rendered. Although the

decision in the end was of the judge, there is no doubt that having the assistance of assessors, particularly in a case of this nature, is of great importance.

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brain. The Judge in the High Court found, however, that his evidence did not exclude the possibility of a nail also having been driven into the head.

The significant point, however, is a different one. It is the discrepancy between Lomasonto's evidence and her earlier statement. This discrepancy did give the trial Judge some difficulty, but he th ought that it could be explained on the basis that she wanted to distance herself as far as possible from the death blow. He did not think that this discrepancy therefore warranted him in making any adverse finding against Lomasonto.

I regret that I must disagree with the learned Judge on this approacho Of the two versions which Lomasonto gave, the one which involved her more closely with the murder was that which she gave in her statement to the Magistrate. This was the version in which she had said that she had seen the nail being used. It is not likely that at the stage when she gave evidence at the trial of the present Appellants, she would now try to distance herself from the death blow. Secondly, the question is not only whether one should make an adverse finding as to the credibility, but also whether, because she was an accomplice. her evidence which she gave at the trial could safely be relied upon without corroboration. This discrepancy suggests to me that it could not be so relied upon.

(b) The second significant difference is that in her statement she had also described how the body had been placed alongside the road. She described in her statement that there was a pipe which passed underneath the surface of the road, and that between the concrete embankment and the pipe, there was a "big rock. She described that the deceased's body had been put on top of the rock, with his head above his knee, in the position of somebody who had been sleeping on the rock. It was suggested that the description

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the way with a torch. She says she saw that Appellant No. 5 carried with him a wheel spanner and what she described as a white-large nail. She said she did not go with the Appellants, and she could not see exactly what was happening to the deceased. But she did hear him say to No. 6, "Even you, my brother-in-law, are watching while people kill me". She heard the deceased cry out once, after which he was quiet, and then she saw the Appellants carry him back to the van in a rug which they had brought with them from the van. They then drove further until they came to the place where the body was ultimately found; and she saw them lower it over the side of the road onto the concrete embankment. She said in her evidence that she could not see where or in what position the body was placed.

When Lomasonto was cross-examined, it appeared that the evidence which she gave in court conflicted with her prior statement to the Magistrate in a number of respects. I would refer to the' two most significant differences:

(a) In her statement she had said that she had seen Appellant No. 5 stand over the deceased and hit the nail into the soft part of his head. In her evidence she had said she did not see what happened. When she was cross-examined, she adhered to her evidence but explained that what she had said in her statement had been an inference from the fact that she had seen Appellant No. 5 carrying a nail and from the fact that he did not bring it back with him.

At the trial of the Appellants there was medical evidence. The doctor who examined the body of the deceased described the wounds. He said nothing about finding a nail in the head, nor did he noticed any wound caused by a sharp instrument. All he said was that there were severe injuries to the skull which had been caused by heavy blows, and that these had caused the injury to the

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description might have been due to some extent to the interpreter's translation, but even if we accept this, the

fact remains that in her statement to the Magistrate had described where the body was placed, and had attempted to describe the position in which it was placed. But in her evidence in this trial, she said she had merely seen it handed down from the road by some of the Appellants to others who were now standing below the road. She said she had seen nothing else. This second discrapancy again cast doubt on the reliability of her evidence.

In addition to the 2 factors I have now mentioned, there were other discrepancies between her evidence and her statement, and if we take them all into account, these indicate that her evidence was not reliable en ough to be acted upon on its own.

There is another unsatisfactory feature and that is, that it appears that her statement had been corrected and edited by the police, and that this was done because the statement to the Magistrate was not quite the same as the previous statement which she had given to the police.

In the case of MAGUMENI MNOUBE AND ANOTHER vs. THE QUEEN which was heard in this court at the end of last year, that is the Appeal case No. 13/82 , this court held that the evidence of the accomplice must be credible and acceptable in itself. If it is not, then it is pointless to look for confirmatory evidence. Lomasonto's evidence in my view, is open to such criticism that it should not be believed, but in any event even if that is putting it too high, her evidence was such that, in accordance with the common law cautionary rule, it would not be safe to convict thereon without corrobarative evidence.

As was said in the case of E. vs, LAKHATHULA 1915 A.D. 326 p. 365 and also in the case of R. vs. GALPEROWITZ 1945A.D

485 p. 492, the corroborative evidence must be such as to satisfy the court that the accomplice was a reliable witness. I proceed therefore to consider whether there was such evidence in this case.

As far as Appellants Nos. 3 and 7 are concerned, Mr. Thwala who appeared for the Crown in this court, very properely conceded that there was no such evidence, and he did not support the
conviction of these two Appellants. As regard the other Appellants, however, there were three other crown witnesses who would be relied upon as providing some corroborative evidence. One of these was the witness Petros Dlamini, who was an Induna who supervised the workers of the school where the deceased worked. He gave evidence that on the day of the killing No. 4 had come to him at the school, and had told him that the deceased was required at home. He said he was asked for permission for the deceased to leave at noon so that he could catch the 1.00 o'clock bus to Mankayane . That is the only corroborative evidence as far as No. 4 is concerned. There is no evidence linking him with the actual events at Mankayane, and as will appear from what I say later, his evidence is not supported by the other two witnesses.

These were 2 persons who were the passengers in the bus. The first of these was Fanie Msibi. He said he kneww all the Appellants The other witness was Smangele Doris Fakudze who was the daughter of Appellant No. 4. Both of them said that they saw the deceased board the bus at Matsapha and that Appellant No. 5 was with him. Neither of them, however, saw Appellant No. 4. Fannie did not see the deceased or No. 5 get off the bus at Mankayane, but he did say that when he himself got off, which was at the point further from Mankayane, the deceased and No. 5 were no longer at the bus. Smangele, however, said that she saw them got off Mankayane. She went on to say that while the bus was still standing there,

she saw the deceased "being taken into the motor vehicle by Appellants No. 1, 2 and 6 and also by Lomasonto. That is to say she said she saw 5 people getting into the motor vehicle.

Now it will be noticed that the evidence of these two witnesses is different from that of Perros, in this respect, that there is no evidence that they saw No. 4 in the bus.

Mr. Twala has said that it was possible that No. 4 might . have travelled to Mankayane in some other way. But lomasonto said that she had seen the deceased come off with Nos. 4 and 5. The evidence of Smangele is that she saw the deceased taken into the motor vehicle while the bus was still at Mankayane. This is different from that of Lomasonto, who said that the motor vehicle was brought only after the bus had left. There is another difference between Smangele's evidence and that of Lomasonto. She says that the motor vehicle had no canopy but Lomasonto said it did have. She said 5 people got into the motor vehicle and Lomasonto said 9 people got in. Mhen one considers all these points, it can hardly be said that her evidence indicates that Lomasonto was a reliable witness. It is not the sort of corroborative evidence that the rule requires.

There is another feature about this case to which I feel it is necessary to refer, and that is there are suggestions that the police officers who investigated the offence influenced the witnesses when they took statements from. There is a suggestion in the evidence that the police may have told the witnesses what they were expecting them to say, and there is also a suggestion that the statements written down by the police may not accurately have reflected what the witnesses had in fact said.

There was one other Crown witness whom I have not yet mentioned, Majalimane Sibanyoni, and his evidence was rejected by

the trial Judge because there was doubt whether his statement reflected what he had actually said. This aspect it was not properly investigated at the trial and wo can not make any findings about it, but it is something to be borno in mind which renders it unsafe to rely on the evidence of the so called corroborative witnesses.

Despite the difficulties in the evidence, the Judge in the court below found that the requirements of the cautionary rule had been satisfied and he convicted all the Appellants of murder. He gave the following reasons :-

(i) He said that Lomasonto's evidence was "very superior" when compared with the evidence of the Appellants themselves;

(ii) He said that she had been ready in her own trial to have herself convicted on virtually the same evidence as she gave in this court;

(iii) He said that although there was no corroboration as to the involvement of Appellants 3 and 7, this was not necessary if the court is satisfied with the quality of the accomplice evidence.

I am unable to agree with the conclusion arrived at by the learned trial Judge. For reasons which I have already given, I do not consider that Lomasonto's evidence could be said to have been superior to that of the Appellants or that it was such a quality as to justify conviction even though not corroborated The fact that she was prepared to have herself convicted on this evidence is not enough to justify reliance being placed thereon. There are many possible dangers which may be inherent in an accomplice's evidence. It is true that one of these is that she may falsely incriminate another person in order to exculpate hem self and that this danger was not present in this case

But another danger is that, while she is willing to admit her own involvement, Lomasonto may have try falsely to implicate others in order to protect people who were her true associates in the crime. The learned . Judge does not appear to have considered this danger.

When I take into account the unsatisfactory nature of Lomasonto's evidence, the conflicts in the corroborative evidence itself, and the dangers arising from over zealous investigation on the part of the police, I find myself left with doubt as to the reliability of the evidence and that of the supporting witnesses.

For these reasons I would allow the appeals against the convictions of all seven Appellants.

(SGD)

S. AARON

JUDGE OF APPEAL COURT

I agree:

.....(SGD).....

R. S. WELSH

JUDGE OF APPEAL COURT

I agree :

.... (SGD)..... ...

I. ISAACS

JUDGE OF APPEAL COURT

The appeal of all seven Appellants are allowed and the conviction and sentences are set aside

...(SGD).....

I. ISAACS.

JUDGE OF APPEAL COURT

the person is an element, committed during the period of suspension.

C. J. M. NATHAN

CHIEF JUSTICE