HELD AT MBABANE APPEAL NO. 11 OF 1979

In the case of MADINA TSABEDZE

and Appellants

SIKHONYANE NYAMANE

versus

THE KING Respondent

JUDGMENT

DENDY YOUNG, J. A.

At the conclusion of the argument in the abovenamed appeal, I was entirely satisfied that the appeal should be dismissed. However, the majority of the court took the view that the conviction was unsafe and the appeal was, by a majority, allowed and the conviction and sentence set aside. In view of the division on the court it was decided that reasons for judgment should be given later. My reasons for dissenting follow:

As my decision is now of academic interest only, I shall content myself with summarising my reasons for judgment.

The ground of appeal advanced before this court was that the trial judge erred in convicting on the evidence of the witness Matikane. It was urged that the case was in effect founded on the evidence of a single witness (Matikane) who was unreliable because of certain apparent criticisms of testimony. In the event, however, there was only one criticism with which it is necessary for me to deal; the others had no substance. It was important to ascertain when

and whether she told the police the story she told in court. It will be recalled that Matikane was (according to her) ordered by the appellants not to disclose to anyone what had taken place under threat of death. The importance of the matter flowed from the fact that Appellant No. 1 was at some stage detained for questioning by the police. One Hluluza was also detained for this purpose. These two men were subsequently released. It appears that Appellant No. 2 was not detained for questioning at that time. This was strange; because, if Appellant No. 1 had been brought in for questioning on Matikane's statement to the police, why was Appellant No.2 not detained at the same time; and why was Hluluza picked up? The point arose in this way. At page 27 of the record the following appears in the cross-examination of Matikane:

"DC: When were you taken by the police? I was taken on a Saturday, my Lord.

Was it before or after the body had been discovered?

H/L: She was taken Saturday and the body was discovered on Thursday."

The court's comment was obviously not translated and it seems that the learned trial judge had jumped to the conclusion that Matikane was talking of the Saturday of the same week. There was no justification for this conclusion. Later in cross-examination Matikane gave the following evidence (pages 47/48):

DC: Do you know Hluluza Ginindza? I do.

Do you know that he was arrested in connection with this matter? No, he was not.

Was he ever interrogated by the police as far as you know?

Yes he was questioned.

And that was because you had told the police that No. 1 was with Hluluza when the deceased was killed, is that correct?

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I did not say so. I said to the police that No. 1 and another/others has said I should say that Hluluza had been responsible for the death of the deceased because Hluluza had been involved in the killing of a person on a previous occasion.

Do you deny you told the police that Hluluza was actually with No. 1? No. I know nothing about that. I told the police that these people had suggested that I should say that it was Hluluza and Madina (No. 1 accused) who had killed a person on a previous occasion.

DC: Did you at any stage tell the police that Hluluza was responsible? No. I did not.

The police were investigating, trying to find the person who was respoonsible. My instructions are that you first told the police that Hluluza was responsible? No. I never did. I said that deceased had been killed by accused No, 1 and 2.

My instructions are that you later changed your story and said that it was Sikhonyane (Accused No. 2) instead of Hluluza? As I have said time and time again, these people warned me and made this suggestion, but No. 1 did not tell the police how it was that the deceased got injured at their hands."

It will be seen that, as pointed out by Mr. Donkoh in his able presentation of the Crown case, Matikane never said that she had told the true story on the Saturday of the same week. We do not know what Saturday she meant.

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The only serious criticism of her evidence therefore feel away. Unfortunately, the learned trial judge carried the error through to his judgment where he said: "However, she (Matikane) did tell her sister; and she told the police when she was taken for examination the following; Saturday (underlining added);" In this the learned trial judge was wrong. There was no reason to think that Matikane meant the Saturday of the same week. Her reliability remained intact. I understand that the majority of the court also took the view that Matikane was an accessory after the fact and therefore had to be treated as an accomplice, because of the assistance she gave in the disposal of the body, I am quite unable to agree. The necessary mens rea to make her an accessory after the fact was absent. In the case of s. v Maree 1964 (4) SA 545 (o) the following exposition of the Roman-Dutch as laid down by the Privy Council in Nkau Majara v The Queen 1954 A.C. 234 (an appeal from Basutoland) was approved:

"The term 'accessory after the fact' as used in criminal law does not, under the law of South Africa - The Roman-Dutch law - bear a meaning identical with that which it has under English law. To constitute a person an accessory after the fact in South Africa it is sufficient to establish that assistance was given to the principal offender in circumstances from which it would appear that the giver 'associated' himself with, in the broad sense of that word, the offence committed, and Roman-Dutch law makes no distinction for this purpose between giving assistance by remaining inactive and refraining from doing something, and giving assistance

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by doing something. The kind of impassivity when it occurs after the commission "of an offence by another, which has for its object the giving of assistance to that other to escape, is under the law of South Africa punishable as the offence of being an accessory after the fact." In Nkau Kajara's case the Privy Council, relying on Huber went on at page 243 to distinguish two kinds of impassivity'

"In the one a person remains passive because, although he had formed an intention to accomplish something prohibited, he does nothing and thereby fails to accomplish it. In these circumstances he commits no offence. In the other, by remaining passive and doing nothing a person accomplishes someting prohibited, for instance, by refraining from arresting an offender he accomplishes something probibited, namely giving an offender assistance to escape. It is the latter form of impassivity which ... is punishable as an offence .... The latter kind of impassivity, when it occurs after the commission of an offence by another and has for its objective the giving of assistance to that other to escape, is under the law of South Africa punishable as the offence of being an accessory after after the fact." (underlining added). Now it is abundantly clear that at the scene of the crime Matikane was acting under extreme compulsion and there can be no suggestion that she associated herself with the crime. In regard to her failure to inform the police immediately, here again she was acting under the threat of vengeance and it is obvious that he "objective" was not to give assistance to the Appellants to escape the consequences of the crime. Moreover, the trial judge, while rightly holding that Matikane was not an accomplice, yet treated her as such and the

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court found that her evidence fully satisfied the cautionary rule. He found her to be a witness of "more than average credibility."

I can discern no possible fault with that view. Her evidence reads extremely well. Of the evidence of Bindzile (the mother) the learned trial judge said: "she was just as impressive as Matikane." Then, after dealing with a certain conflict with Matikane, he continued: "For the rest Bindzile fully corroborated Matikane's evidence and she was unshaken in cross-examination. I have no criticism to make of her." Of Lomowasho (Matikane's sister) he re remarked: "Apart from this(a minor conflict) she corroborated Matikane's evidence "in regard to the story that the latter had told her in regard to the finding of the exhibits. The importance of this evidence, which was in no way shaken, is obvious."

The evidence reads well and it is obvious that the trial judge found her a credible witness.

The evidence of Sydney Dlamini (the owner of the beerhall) corroborated Matikane in a dramatic way in regard to visibility from inside the beerhall. There was no suggestion that Sydney was no truthful.

The evidence of these witnesses constituted the Crown case. Intrinsically the evidence was convincing. There were no serious contradictions, no fault of partisanship or enmity, no improbability. There was entire consistency with the medical and police observations..

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The remaining question was whether the defence evidence could positively be rejected.

The trial judge said of Appellant No. 1: "I have no adverse comments to make in regard to No. 1 appellant's demeanour. The same cannot be said, however, of the content of his evidence." His case was a denial of participation coupled with an alibi. However, at the end of the day the alibi was in tatters.

Of Appellant No. 2 the learned trial judge said: "No. 2 accused in his evidence was considerably less impressive than even No. 1 accused." His case was also a denial coupled with an alibi. His alibi too ended in tatters. It was urged by counsel for the appellants that it was not for the accused to prove their alibi; all appellants had to do was to raise a doubt. However, the witnesses to the alibis were so contradictory that the credibility of the appellants was seriously impaired. There was, in my view, ample justification for positively rejecting the defence evidence.

In the result the learned trial judge accepted the Crown case. I can find no fault with this decision. No ground for interference with his findings of fact have emerged.

The above are my reasons for holding that the appeals ought to have been dismissed.

J.R. DENDY

YOUNG JUDGE OF APPEAL.

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