

IN THE COURT OF APPEAL OF SWAZILAND

APP. NO.: 22/81

In the matter between :

PHILLIPA MAY MDLULI Appellant

And

THE KING Respondent

C O R A M : Maisels, J. P.

: Isaacs, J.A.

: Mahomed, J.A.

FOR APPELLANT : D. Lukhele

FOR CROWN : A. Donkoh

JUDGMENT

MOHAMED J.A.

(Delivered on 12th April, 1982)

The Appellant in this case was charged with the crime of murder in that on or about the 22nd March 1980 and at or near Mbabane she did wrongfully and unlawfully and maliciously kill and murder Thulie Mabaso.

The deceased was a girl who was about 2½ years old and according to the evidence of Dr Khare who conducted the post-mortem on the body of the deceased, the death was due to suffocation. The body had been found in a river but death was not due to drowning. The child had swallowed blood from wounds in her mouth. There had been removal of tissues around her labia majora and around the mouth and the eye.

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There was no direct evidence to the effect that the Appellant had in fact killed the deceased, but the Crown case rested substantially on circumstantial evidence from which the Court a quo drew the inference that the Appellant was responsible for the death of the deceased. I propose to deal with that evidence.

The first substantial witness called by the State was Mandla Henry Mdluli. He was warned as an accomplice. He said that the Appellant was his uncle's wife. In March 1980 he had been working at the Mbabane Club. He visited the restaurant which was operated by the Appellant. He was asked by the Appellant to look after the deceased. He in fact did so. Later, on the 20th March 1980, he again went to the Appellant's restaurant. There were other people there, whom he named. They included one Peter Mabaso, who was also a witness in the case. The Appellant was also there. The Appellant asked the witness to be at her home at Checkers on the next day.

According to Mandla Mdluli the Appellant said that the purpose of the witness' call at the house of the Appellant on the next day was for the witness to look after the child she had asked for from Peter Mabaso. Mandla Mdluli further testified that he in fact went to the house of the Appellant on the next day at approximately 1p.m. While he waited at the house a number of children arrived from a party which had been held at the restaurant of the Appellant. This party had been organised by the Appellant. The deceased child had also been at the party. Mandla Mdluli went on to say that the children played about the Appellant's home until about 6p.m. Mabaso then came to collect the children but left behind the deceased with Mandla Mdluli. (The deceased was in fact the child of Peter Mabaso). The witness further testified that a little later Mabaso came to the house and spoke to one Amina Mdluli, who apparently worked at the house of the Appellant. Mabaso took the child from Amina and went away with her. In accordance with what Mabaso had asked him to do, the witness then pretended to organise a search for the child. He made enquiries at a homestead. Two young children helped him in the search.

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Mandla Mdluli further testified that after this search he returned to the house of the Appellant and then went to the restaurant where he in fact found Peter Mabaso. Mandla Mdluli, accompanied by Peter Mabaso and one Piet Nkambule then went to the police station and made a report to the effect that the child was missing. A little later the witness and Peter Mabaso went to the restaurant. This was about 7.00p.m. They waited until the restaurant closed at 10p.m. Afterwards the Appellant arrived and told her husband that it had been alleged that a child was missing. One Nhlabatsi who was present suggested that the matter should be reported to the Swaziland Broadcasting Service. The witness then went in a landrover together with the Appellant, Peter Mabaso and Nkambule to report the matter to the Swaziland Broadcasting Service. The landrover in which they travelled belonged to the husband of the Appellant, and Peter Mabaso was driving it. The party did not, in fact, stop at the premises of the Swaziland Broadcasting Service, but proceeded to the house of the Appellant at Checkers. At this house and in the bedroom of Peter Mabaso the witness, Peter Mabaso himself, Pat Nkambule and the Appellant then sat, drinking gin. A little later the husband of the Appellant and Nhlabatsi arrived at the house from the Swaziland Broadcasting Services. Nhlabatsi suggested that Peter Mabaso should look for the child from home to home, but the Appellant stated that there was no need for Peter to look for the child.

In cross-examination Mandla Mdluli said that the killing of the child was not discussed in his presence. He confirmed that Peter Mabaso was related to the Appellant and to himself. He further admitted that he was arrested by the police about 3 days after the body of the deceased had been discovered. He had been detained for about 13 months. He was questioned many times about the death of the deceased.

This witness was subjected to a lengthy and searching cross-examination, during the course of which he contradicted himself in certain matters but adhered to the substance of his version. He admitted that whilst he had

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been detained he had escaped and had gone to the Appellant. He wanted to go to Johannesburg to avoid harassment by the police. In answer to one of the assessors he said that he knew that the child was to be killed for the purpose of the Appellant's business, and that he agreed because his salary was to be increased. Clearly this witness is to be treated as an accomplice and his evidence must be approached with caution.

The next witness called by the Crown was Gelane Littler who said that she was 16 years old. She knew the Appellant and the deceased. On the 22nd March 1980 she was at a party at the shop of

the Appellant. She had been invited by the Appellant. The deceased was also present. She said that the children had gone to the party "in Mdluli's motor vehicle", which had been driven by Peter Mabaso. After the party she and the other children had gone to the house of the Appellant at Checkers, on foot. They played there. Whilst they had been playing a motor vehicle from the shop of the Appellant came and took away some of the children. The other children walked to their homes. The deceased was still at the house of the Appellant when the witness went home. Her home was near to that of the Appellant. The two homes are on the same road, the witness' home being below that of the Appellant. There are no other houses between them.

Gelane Littler then goes on to give a crucial piece of evidence. She says that after she had returned to her home she saw Mdluli's vehicle back at the house again. Mabaso alighted and went towards the house. The Appellant was in the vehicle and remained in it. She then saw Mabaso return with the deceased to the motor car. Mabaso and the deceased got into the vehicle which then drove off towards Sandla. She said that it was not dark and that she could see clearly. The vehicle was Mdluli's landrover. She did not see the deceased ever again afterwards.

In the course of cross-examination she said that she

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was questioned by the police on a Friday, following the Saturday she had seen the deceased. She said she was taken by the police for questioning on seven different occasions. She was very closely cross-examined as to what she had told the police. Although she contradicted herself in certain respects, she did not deviate from the essentials of her evidence in chief. She admitted that the house she lived in was in fact not on the same street as the house of the Appellant, but she insisted that she could see what was happening at the Appellant's house from the verandah of her house. An inspection in loco was held, the details of which are referred to in the judgment of Will, A.J. It appears from these observations made at the inspection in loco that the witness could in fact have seen what she said she had seen.

The Crown then called Peter Mabaso, who was correctly warned as an accomplice. He said that the Appellant was an aunt and that he was staying with her. The deceased was his daughter. He testified that he was working as a driver for the Appellant who, he said, was an aggressive person and that he feared her. Peter Mabaso went on to say that in a conversation with him the Appellant asked him to bring his child so that she could make use of her to get more customers. The business of the Appellant had not been prospering. The shop was not fully stocked because there was not enough money to buy goods. The witness stated that the two were alone when the Appellant made the suggestion that he should bring his child in order to enable the Appellant to make use of the child. He stated that he told her that he was afraid but that the Appellant had persisted in the request and promised to raise his wages.

Certain preliminary discussions then took place and in the result a proposal was made about a journey to the Mlilwane Game Sanctuary from where they would proceed to Lobamba in order to fetch the deceased. After the return

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from Mlilwane the Appellant stated that they would be going to KwaZulu in order to inform an Inyanga that they had found the child and that she was at home. A journey was in fact made to KwaZulu, according to the witness, by the Appellant, Mrs. Mthembu and a Mrs. Nxumalo who all went together to see the Inyanga.

Peter Mabaso then goes on to depose to certain conversations at the restaurant of the Appellant in which the Appellant talked about the fact that the deceased was to be used in order to make

muti so as to attract customers to the business of the Appellant.

The crucial part of Mabaso's evidence is that after the party had been held on the 22nd March 1980, he and the Appellant at some point got into the vehicle and drove to the house of the Appellant at Checkers. The vehicle was parked below the house and the Appellant asked the witness to go and fetch the deceased from Mandla Mdluli who was in the house. The witness goes on to testify that he in fact did so and after bringing the child he gave it to the Appellant who put it on her lap. He and the Appellant then drove to St. Mark's at the request of the Appellant. On arrival at St. Mark's the Appellant alighted with the child and went into the house of Mrs. Mthembu. The witness remained behind and saw one Frank Mthembu (apparently the son of Mrs. Mthembu) come out of the house and go in the direction of the "study place". The witness also goes on to depose to arrangements to take Nonhlanhla (a daughter of Mrs. Mthembu) to the house of the Appellant at Checkers to watch television, because it was considered unwise to make use of the deceased in the presence of Nonhlanhla, who might tell other school children about what had happened. It should perhaps be stated that there was a television set at Mrs. Mthembu's house.

Peter Mabaso then goes on to say that after he had taken some children to the house of the Appellant at Checkers

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he remained at the restaurant until the shop closed at 10 p.m. The Appellant arrived at the shop a little later and Peter Mabaso then goes on to give evidence about the pretended search for the child. On the following day the witness heard that the deceased's body had been found.

This witness was also subjected to a searching and close cross-examination. He also admitted having been kept in police custody for some 14 months and that he had been in police custody up to the time when he gave evidence at the trial. He stated that he had been interrogated every day from Monday to Friday, during every week of his detention. He had initially denied having taken the child at all and had only admitted that after some 7 or 8 days. He only admitted being involved in the killing of the child some two months and some days after his initial arrest. Later he denied that he was being questioned 5 times a week, for over a year. He was equally unsatisfactory when asked about whether he was aware that the child was to be killed when he helped to take the child to the house of the said Mthembu. During examination in chief he admitted that he had collected the deceased at the house of the Appellant in order to transport her to the house of Mrs. Mthembu with full knowledge of the plan to have the child killed, but in cross-examination he denied that he knew what was about to happen to the child. In re-examination he again reverted to his original version. The learned trial Judge concluded that Mabaso was a man of low intelligence and that his attempt in cross-examination to deny that he knew that the child was about to be killed was an endeavour to play down the role which he had played in the crime. The learned trial judge concluded, however, that notwithstanding the criticisms of the evidence of Peter Mabaso the witness was being truthful in the essential features of his version. These features were that the deceased was in fact fetched by the witness and the Appellant from the mother of the deceased for the purposes of killing the deceased; that on the Saturday following the week in which the deceased was kept from

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her home in Lobamba the Appellant, together with certain other persons, had gone to KwaZulu to consult an Inyanga and to tell him that a child had been acquired; that after the children's party on the 22nd March 1980 the witness Mabaso had taken the deceased from Mandla Mdluli and gave her to the Appellant who was sitting in the landrover; and that the child was thereafter taken to the house of Mrs. Mthembu for the purposes of making "libaso" to attract customers to the shop

of the Appellant.

The evidence of the two accomplice was corroborated in certain respects by other witnesses called on behalf of the Crown.

The witness Frank Mthembu, who was the son of Mrs. Mthembu, stated that he was at home when the Appellant came into the house of Mrs Mthembu on the 22nd March 1980. He left the house of Mrs Mthembu, alone in a car belonging to the Appellant. He stated that he came back to the house later and saw his mother and the Appellant in his mother's bedroom. Somebody phoned, asking for the Appellant, but as a result of what he was told he told the caller that the Appellant was not there. There was a further call for the Appellant and the witness again went to his mother's bedroom. His mother told him to tell the caller that the Appellant was not there. This time the witness told his mother to speak to the caller personally and then went into his own bedroom.

Frank's sister, Lydia Nonhlanhla Mthembu, who was 15 years of age, also gave evidence. She said that she saw the Appellant at her mother's home on the 22nd March 1980 at about 6p.m. She said she was taken by her mother to the Appellant's shop and from there she went to the house of the Appellant. At about 10 o'clock her mother came with the Appellant to the house of the Appellant and her mother then took her home. She stated that whilst she was at the shop of the Appellant she was told by her mother to stay at the

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shop. The witness complained that she was anxious to watch television and she was then told by her mother, in the presence of the Appellant, that she could go and watch-television at the house of the Appellant.

In addition to these witnesses the Crown also called one Leslie Mentiwa Kunene who said he was a herbalist. He said he knew the Appellant, who was introduced to him by her sister, Mrs Nxumalo. He stated that the Appellant wanted him to treat her for a sprained ankle. Sometime after March she came to him again. The Appellant was with another woman. She asked for help as it had been alleged that she had killed a child. The Appellant said "they were six in all when they committed the murder." He said the Appellant appeared to be normal when she spoke to him. He gave her muti to wash herself. Before she had made the damaging admission to him he had told her that in his position as an Inyanga, he could be compared to a lawyer and that before he could be in a position to help her she would have to tell him the whole truth. After this conversation he decided to report the matter to the police and in fact did so.

Finally the Crown called the witness Sonengani Mamba, who was the mother of the deceased. She confirmed that on a certain Sunday the Appellant, the child's father and a certain young man had come to her house. She was asked to dress up the deceased and the party then took the child with them to Mbabane. The rest of her evidence does not appear to be material.

After the Crown had closed its case, the Appellant gave evidence herself. She confirmed that she had been running the Lifa restaurant, of which her husband was the owner. Her husband was employed by the Government. She stated that the restaurant was in fact prospering. In effect, she denied the evidence of Peter Mabaso, who she accused of having stolen goods from her. She admitted having gone to KwaZulu with certain other persons, but she stated that she had gone in the company of one Suna, who had to be treated for a

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fractured elbow. She denied any meetings or any discussions about killing the deceased, or any

other child. She denied the evidence of Mandla Mdluli. She admitted that there was a party at her restaurant on the 22nd March 1980. She stated, however, that this was a joint party on behalf of Princess Runga and for the youngest child of the Appellant, Sonke Mdluli. She admitted that she had sent Peter Mabaso to collect some of the children from the house to the restaurant-He in fact did so, but later disappeared although she wanted him to go and buy some liquor. Instead she sent one Mthisi to buy the liquor. The Appellant denies going to the house of Mrs Mthembu on the 2 2nd March 1980 with Peter Mabaso and the child. She also denied that she was at the spot pointed out by Gelanc Littler.

The Appellant stated that when Peter Mabaso turned up later she asked him to take her to one Thembi Nxumalo, because she wanted to apologise to her about a certain quarrel which they had had earlier in the day. Thembi Nxumalo was at Sandla. She said that they did not go into the house of Thembi Nxumalo because when they got near the house they found the car belonging to the husband of Thembi Nxumalo and the Appellant was reluctant to go into the house in the presence of the husband, because the husband of Thembi Nxumalo used to accuse the Appellant of causing his wife to drink. In the result they returned to the restaurant. At her place she was sitting at a table with one, Mthisi and Pat Nkambule when the witness Nonhlanhla Mthembu came in with a message to the effect that her mother, Mrs Mthembu was calling the Appellant outside. The Appellant went outside and saw Mrs Mthembu who suggested that the Appellant go with Mrs Mthembu to the house of the latter. Mrs Mthembu said that there was a present for the Appellant at her house, but she did not at that stage say what it was. When they got to the house of Mrs Mthembu the Appellant was given some liquor. She found the witness Frank Mthembu at the house of Mrs Mthembu playing records. Nobody else was at the house.

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In consequence of a telephone call which was received at the house of Mrs Mthembu, the Appellant heard that the deceased was missing. She and Mrs Mthenbu then went to the house of the Appellant to fetch Mrs Mthembu's daughter. From there they went to the Appellant's shop and from the shop they went to the broadcasting station, because the Appellant's husband suggested that a report be made about the fact that the child was missing.

Later the Appellant returned to her house and went to the bedroom of Amina Mdluli, who was in her employ. She had been looking after the children and the Appellant wanted to find out what had happened. Amina said that she had not been aware that the child had been left behind and she said that she had seen the child disappearing in the company of a boy by the name of Toffolux Makama. The disappearance of the child did not bother the Appellant too much, because she thought that a certain Mazonco or Mazongo, who was related to the mother of the deceased, might have taken the child.

The Appellant admitted going to Leslie Kunene, the Inyanga, because of a fractured ankle. She also admitted going to see him a second time. She explained that there had been a news item in the Times of Swaziland to the effect that her husband had killed the child and she wanted the Inyanga to divine whether this was in fact true. Kunene looked at a mirror and simply said it was difficult.

The Appellant denied telling Kunene that she had killed the child.

The Appellant was cross-examined at great length. She admitted that she had gone to consult a prophet after the disappearance of the child. She said she had gone with Mrs Mthembu and one Nomthandazo , who was a cousin of Mdluli. The Appellant said chat she wanted the prophet to tell them what had happened with the deceased Thulie. According

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to her passport this was on the 13th May 1980. The Appellant was also cross-examined on exhibit 5, which is a letter written by her. In this letter she wrote about what Shembe (apparently the prophet whom she had consulted) had done. She wrote that whoever had killed the deceased should be identified. In the letter she wanted the child to "release" Peter Mabaso and Mandla Mdluli.

In a careful and thorough judgment the learned trial judge analysed the evidence and accepted the testimony of Kunene as to what the Appellant is alleged to have told him. The trial judge also accepted the evidence of both accomplices in so far as the essential portions were concerned. He stated that the evidence of the Appellant was unsatisfactory and he rejected that evidence. In the result he convicted the Appellant of murder and sentenced her to death.

On appeal, Mr Lukhele, who appeared for the Appellant, strongly attacked the evidence of the accomplices Mandla Mdluli and Peter Mabaso. In the first place he drew attention to the fact that both the witnesses had been detained for a period of 14 months without any lawful authority and that they had been subjected to considerable interrogation during the period of their detention. I am of the view that there is no justification whatever for the detention of these witnesses for such lengthy periods and without any lawful authority. The liberty of a subject and his right to protection from unlawful arrest and detention is fundamental to any civilized society, based on the rule of law. The Courts will zealously defend and enforce those rights, in common with the learned trial judge. I am indeed distressed to learn that witnesses are detained in Swaziland for such lengthy periods and without lawful authority as in this case. Such a practice not only infringes a basic right of the subject but compels a Court to approach with great caution the veracity of the evidence

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obtained in consequence thereof. I trust that this practice will not again be repeated by the police in the Kingdom of Swaziland. The attention of the Commissioner of Police is drawn to these remarks.

Mr Lukhele submitted that for this reason and for the reason that both Mabaso and Mdluli were accomplices their evidence should be approached with great caution. This is undoubtedly correct and was appreciated by the learned trial judge who subjected the evidence of these witnesses to close scrutiny. In particular the Court was aware that Peter Mabaso, who was the crucial witness, was unsatisfactory in various respects. His evidence can only be accepted if it is corroborated by satisfactory other evidence and if it is clear from all the circumstances that the version given by the Appellant is false beyond a reasonable doubt.

In certain material particulars the testimony of Peter Mabaso is admitted by the Appellant. Thus, the Appellant admits that the Appellant accompanied the witness Mabaso to Lobamba in order to collect the deceased from her mother on one Sunday in March 1980. The Appellant also admits that the deceased attended a party at the restaurant of the Appellant on the afternoon of the 22nd March 1980 and then returned to the Appellant's house in the late afternoon. The Appellant also does not deny Mabaso's evidence that later on the same evening she was at the house of Mrs Mthembu at St. Marks; although the Appellant denies that she went there in the company of the deceased. She also admits that whilst she spent the evening having some drinks with Mrs Mthembu, Mrs Mthembu's daughter, the witness Nonhlanhla was at the house of the Appellant.

An important aspect of the evidence of Peter Mabaso, which the Appellant denies however, is his averment that he had gone with the Appellant in a landrover to the house of the Appellant and that on the instructions of the

Appellant he had fetched the deceased from the house and brought her to the Appellant. Mabaso's evidence in this regard, that he had gone to the house to fetch the deceased was corroborated by Mandla Mdluli who said that the deceased was in fact taken by Mabaso from him. More significantly the completely independent witness Gelano Littler testified that she in fact saw the landrover with the Appellant inside it. She stated that on that occasion Peter Mabaso went to the house of the Appellant, came back with the deceased to the landrover and that the landrover then drove off towards Sandla. It was not suggested that Gelano Littler had any motives to be untruthful. Nor could it really be suggested that this was a question of mistaken identity, because Gelane Littler knew both the Appellant and Peter Mabaso well. An attempt to demonstrate through cross-examination that Gelane Littler could not have seen the Appellant from the position in which she stood provoked an inspection in loco, but the findings made at that inspection show that Gelane could in fact have seen the Appellant from the position which she described.

The evidence of Peter Mabaso and Gelane Littler is corroborated by other independent testimony. According to the Appellant she went to the house of Mrs Mthembu with Mrs Mthembu herself after the latter had called at the Appellant's house. Peter Mabaso on the other hand said that he took the Appellant to the house of Mrs Mthembu, together with the deceased. Significant in that regard is the evidence of the youngest Frank Mthembu, who was also an independent witness. The testimony of Frank Mthembu was that when he left the house of Mrs Mthembu at about 6.30p.m. he saw the Appellant in the house and the driver of her vehicle, Peter Mabaso, sitting alone in the vehicle outside. This clearly suggests that the Appellant arrived at the house of Mrs Mthembu together with Peter Mabaso and not alone in the company of Mrs Mthembu as she had testified.

I have examined the evidence of Gelane Littler and Frank Mthembu in this regard and I have been unable to find any improbability or unsatisfactory features therein. In my view the State has succeeded in proving that some time after the party on the 22nd March 1980 the Appellant, in the company of Peter Mabaso went in a landrover to a point outside the house of the Appellant and that Peter Mabaso thereafter removed the deceased from the house and brought her to the Appellant in the landrover.

What happened to the deceased after that? On the evidence of Peter Mabaso he drove the Appellant and the deceased to the house of Mrs Mthembu, and the Appellant then took the deceased inside the house. That was the last time that any witness saw the deceased alive. Her body was discovered the next day.

If the finding that the Appellant received the deceased outside her home in the landrover is correct, then the Appellant has not explained what she did with the deceased after that. It is necessary, however, to consider one apparent difficulty in the case for the Crown. This is the failure on the part of any person at the house of Mrs Mthembu to give any testimony to the effect that when the Appellant came to the house of Mrs Mthembu she was in the company of the deceased at any stage. Frank Mthembu merely testified that he saw the Appellant go to his mother's bedroom and that he saw Peter Mabaso sitting in the vehicle outside. He does not mention seeing the deceased at all. Does this mean that the deceased was not with the Appellant? Mr. Donkoh who appeared for the Crown suggested other possibilities. One possibility was that the house of the Mthembus had several entrances and that the deceased could have gone through one of these other entrances without having been seen by Frank Mthembu. This is not a possibility which can be rejected as being unreasonable, although



it was never contended by Peter Mabaso that this happened. In truth this aspect of the matter was never properly canvassed in the evidence.

On all the evidence of Mrs Mthembu was clearly in a position to say precisely what had happened at her house that night. For this Mr Lukhcle for the defence contended that an adverse inference should be drawn against the Crown for its failure to call Mrs Mthembu as a witness. Mr Donkoh, on the other hand, contended that on the version given by the Appellant Mrs Mthembu was in a position to corroborate her defence and that an adverse inference should, accordingly, be drawn against the Appellant, arising from her failure to call Mrs Mthembu as a defence witness. On the version deposed to by the Crown witnesses it may well be that Mrs Mthembu was herself involved in the killing of the deceased. If that is so, the State could hardly be expected to find a witness who would give evidence to the effect that she was involved in an unlawful killing. That could perhaps be true if the witness was given an indemnity against prosecution by the Crown. But there may be, in fact, good reasons why the Crown was not prepared to offer such an indemnity. The version of the Appellant on the other hand involved no admission of any unlawful act or the part of Mrs Mthembu. She could therefore have more easily been called by the defence. This does not mean, however, that the defence had any onus to prove its case.

R. vs. Bezuidenhout, 1954(2) S.A. 188 (AD); Elgin Fire Clays Ltd. vs. Webb, 1947(4) S.A. 744 (AD) Brand vs. The Minister of Justice, 1959(4) S.A. 712 (AD).

Relevant in testing the veracity of the Appellant's version as to what transpired on the evening of the 22nd March 1980, is her conduct when she heard that the deceased

was missing. In her evidence in chief she stated that she had heard about the missing of the child whilst she was still at the house of Mrs Mthembu, she then went to her shop and from her shop she went to her house. Upon reaching her house she enquired from an employee, one Amina Mdluli what had happened to the child. She was told that Amina had seen the child disappearing in the company of a body by the name of Toffolux Makana. The Appellant concluded that the child must have been taken by one Mazonco or Mazongo, a woman who was related to the mother of the deceased, and who worked at or near the Appellant's shop. When she was cross-examined on this version, the Appellant stated that after learning about the fact that the child was missing she went straight to her home in the company of Mrs Mthembu. Upon reaching her home she enquired where Peter Mabaso and her husband were, but she did not enquire from Amina what had happened to the child, nor did she ask Nonhlanhla any details about the missing child, although it was Nonhlanhla who had actually phoned at the Mthembus reporting the fact that the child was missing. In cross-examination the Appellant also elaborated that Amina had explained that although Toffolux had taken the child, he had come back without the child and had said that the child had been taken by the relatives of the mother of the child. The Appellant, however, did not go to this relative that night in order to find out whether the deceased, who had been entrusted to the Appellant's care, was indeed there. Indeed the Appellant claimed that after she was given this explanation by Amina she did not believe that the child was missing at all. Notwithstanding that, however, she failed to take any step to contact the police and broadcasting station to alert them to the fact that the child was safe and that it was unnecessary to conduct their search.

The Appellant's conduct on the next day is also unconvincing. According to her she was told that the father of the deceased had not succeeded in finding the child, but she made no attempt to ask Toffolux exactly

what had happened to the child and where toffolux had taken her.

In all the circumstances I am of the view that the conduct of the Appellant, after she had heard that the deceased was missing, suggests very strongly that she knew that the child was dead. This strengthens the inference that she had something to do with the killing of the deceased.

There appears to be other corroboration which points to the guilt of the Appellant. Thus Peter Mabaso testified that the Appellant was to go to KwaZulu in order to tell an Inyanga that a child had been found and that this child was at home. The child was to be used as muti for bringing customers to the shop. This is denied by the Appellant, but she admits that she travelled to KwaZulu to consult an Inyanga, after the deceased had been brought to her house. She also admitted that she passed through the border gates on the 8th March 1980, together with her friends Mrs Mthembu and Mrs Nxumalo. But she contended that she was going to Pietermaritzburg for the purposes of delivering a boy who had been injured to the Edendale hospital, near Pietermaritz-burg and that it was whilst she was in Pietermaritzburg that she took the opportunity of visiting an Umthandazi, because of her matrimonial problems. The passport of the Appellant showed, however, that when she entered the Republic of South Africa, she was permitted to enter that country for the purpose of "besoek H. 299 - Eskawene, Empangeni". Empangeni is in fact in KwaZulu and far removed from Pietermaritzburg in Natal. She must therefore have known when she left Swaziland that she was going to KwaZulu. Her explanation for the entry in her passport was that these details were given by Mrs Mthembu to the Immigration Authorities. This does not appear to me to be a convincing explanation.

Apart from the foregoing evidence, there was the evidence of the Inyanga, Kunene, to the effect that the Appellant had consulted him and had made an admission to the effect that "there were six in all when they committed the murder". The Appellant did not deny consulting Kunene, but she denied having made this admission to Kunene. Mr Lukhele made a strong attack on the veracity of Kunene as a witness and this attack is not without force. If the conviction of the Appellant was based solely on the evidence of Kunene the Crown could not have succeeded in obtaining a conviction. The learned trial judge, however, came to the conclusion that the guilt of the Appellant had been established even without the evidence of Kunene. I am of the view that he was correct in this conclusion.

In all the circumstances I am not persuaded that the learned trial judge was incorrect in his finding, and in accepting the substance of the evidence of the two accomplices, Peter Mabaso and Mandla Mdluli, which I have referred to in the earlier part of this judgment. That evidence establishes the guilt of the Appellant beyond a reasonable doubt.

In the result I am of the view that the appeal against the conviction and sentence should be dismissed.

Signed

I. MAHOMED

JUDGE OF THE COURT OF APPEAL

I agree.

Signed

I.A. MAISELS

PRESIDENT OF THE COURT OF APPEAL

I agree.

Signed

I. ISAACS

JUDGE OF THE COURT OF APPEAL

Order: Appeal dismissed.