

IN THE APPEAL COURT OF SWAZILAND

HELD AT MBABANE APP. CASE NO.20/85

JOANA T. DLAMINI

AND

THE QUEEN

CORAM: MAISELS, J.P.

AARON, J.A.

HANNAH, C.J.

JUDGMENT

(11/3/86)

Hannah, C.J.

On the 5th June, 1985 this appellant was convicted of murder and was sentenced to death. She now appeals against both conviction and sentence.

The principal Crown witness, Lindiwe Dlamini, was presented to the trial court as an accomplice: her evidence may be summarised quite shortly. The appellant apparently stood in loco parentis to her and she resided at the appellant's homestead. The victim of the alleged murder (to whom I shall refer as "the deceased") was her lover but, she said, in about October, 1984 the appellant encouraged her to form a relationship with one Musa Kunene who appeared at the trial as the appellant's co-accused. According to the accomplice, during the month of October the appellant suggested to the co-accused that he should kill the deceased. The reasons for this suggestion are not altogether clear but it would appear that the appellant wanted the accomplice's relationship with the deceased conclusively terminated thus clearing the way for her own protege and she also had a desire to rid herself of the deceased's father who was also resident at the homestead. The co-accused agreed to the proposal, though reluctantly, and a date was set for the murder.

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The accomplice then described in some detail what occurred on the appointed evening. I do not consider it necessary to set out her evidence in any detail. She described a charade whereby the co-accused faked drunkenness and was removed from the house by the deceased at the instigation of the appellant and how the deceased came to sleep next to her. Another person in the house, Thandi Dlamini, was, she said, locked in a bathroom by the appellant and the co-accused returned to the house and was let in by the appellant. The co-accused was then supplied with some dagga by the appellant to give him courage and the co-accused then stabbed the deceased to death. The appellant was present while this occurred and attempted to prevent blood from the deceased flowing onto the floor. The deceased was then dressed by the appellant and his body was placed outside the house. The floor was then washed in order to remove traces of blood and when this was completed Thandi was released.

The evidence of the accomplice was corroborated in material respects by Thandi who was also

called by the Crown. She confirmed that the deceased had removed the co-accused from the house and that subsequently she, herself, had been locked in the bathroom by the appellant. She shouted to be released but no one came. While there, she could hear people moving in the house and the sound of the front door being opened and finally she was released from the bathroom by the appellant. The appellant gave her no explanation for her temporary incarceration. She then went to sleep next to the accomplice and noticed that the floor was wet as if it had been washed. Later in the night the co-accused, who had left earlier, knocked on the door and the appellant was awoken. The appellant warned him to say nothing to the police and instructed him to spend the rest of the night at the house because his clothes were blood-

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stained. When Thandi questioned her about the blood-stains she disclaimed any knowledge of it. In the early hours of the morning the appellant let the co-accused out of the house and again warned him to say nothing to the police.

The co-accused gave evidence in his own behalf and admitted to killing the deceased but claimed that he had been incited to do so by the appellant. His evidence was in line with that given by the accomplice. The appellant, on the other hand, denied all knowledge of any plan to kill the deceased or of her alleged complicity in the killing. She was suffering from the after-effects of a tooth extraction that evening and after the evening meal had gone to bed. At about 10p.m. she was informed that the co-accused was at the door wanting to see the accomplice but she refused him permission to do so and again went to her bedroom where she took painkillers and went to sleep.

As appears from the foregoing summary the main issue for determination at the trial was one of credibility. The learned Chief Justice resolved this issue in favour of the Crown. He was clearly impressed by the accomplice whom he described as "a very good witness indeed" and pointed out that her evidence had withstood lengthy cross-examination without damage. He expressed himself satisfied that her evidence was completely truthful. He also accepted the evidence of Thandi and that of the co-accused and rejected that of the appellant.

Mr. Ndzimandze has submitted that the learned Chief Justice in making his findings on credibility failed to support them with any detailed reasons and has referred to certain South African authorities which indicate that a trial judge is expected to state reasons for his findings.

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While it may be that the learned Chief Justice could have gone further in setting out his analysis of the probabilities and improbabilities arising from the evidence I am satisfied on my own analysis of the evidence that the probabilities and the weight of the evidence were overwhelmingly against the account given by the appellant. In particular, there is not the slightest suggestion that Thandi was party to this crime and on her account the appellant must have been actively engaged in what happened that night and was not, as the appellant claimed in evidence, asleep in her bed. When the probabilities arising from the evidence are taken together with the learned Chief Justice's assessment of the witnesses his findings on credibility were, in my opinion, completely justified.

A further point made by Mr. Ndzimandze concerned the absence of any reference by the Chief Justice to the fact that the co-accused was an accomplice and that his evidence should be treated with caution. While I am prepared to accept that it is desirable that the evidence of a co-accused which implicates another accused should, in certain circumstances, be approached in much the same way as any other accomplice this is no more than a rule of practice and failure by the judge expressly to warn himself is not necessarily, in my opinion, an irregularity. See R v

Prater (1960) 44 Cr. App. R.83 CA and R v Stannard and Others (1964) 48 Cr. App. R.81. In the instant case the learned Chief Justice clearly had well in mind the need to look for corroboration of an accomplice as he expressly directed himself on the question in relation to Lindiwe's evidence and, in my opinion, there is no reason to think he did not approach the evidence of the co-accused in like manner.

Another point advanced by Mr. Ndzimandze turns on his contention that parts of the accomplice's evidence were inconsistent with the summary of her evidence which was before the trial court but

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which is not, I might add, part of the record before this court. Relying on S v Xaba 1983(3) S.A. 717 Mr. Ndzimandze submits that in these circumstances it was the duty of the Crown to provide the defence with a copy of her statement for the purpose of cross-examination. While I accept that there is a duty on the Crown to draw the attention of the defence to any serious discrepancy which emerges between the evidence of a crown witness and a prior statement made by that witness that duty is, I think, fulfilled if the serious discrepancy is readily apparent from the summary of evidence already provided by the Crown. It then becomes a matter for the defence to decide whether to cross-examine on the basis of the summary and, if necessary, to ask for the witness's statement to be disclosed. That was not done by the defence attorney in this case, and in my view, the defence now has no legitimate ground for complaint. Quite apart from the foregoing, Mr. Ndzimandze was unable to advance such discrepancies as there may have been as serious discrepancies.

In my judgment, the learned Chief Justice weighed all the material parts of the evidence which was placed before him and I can find no reason for interfering with his findings of fact. I would therefore dismiss the appeal against conviction.

As for sentence, no extenuating circumstances were found by the learned Chief Justice and Mr. Ndzimandze has been unable to present any argument that they should have been. This was a planned, deliberate murder perpetrated in cold blood and for my part I also can see no basis for a finding of extenuating circumstances.

I would therefore dismiss this appeal in its entirety.

N.R. Hannah

CHIEF JUSTICE

I agree.

I.A. Maisels

JUDGE PRESIDENT

I agree.

S. Aaron

JUDGE OF APPEAL