IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE.

CR. APPEAL NO.12/93

In the matter between

JEREMIAH PETROS DLUDLU APPELLANT

AND

THE KING RESPONDENT

CORAM: KOTZE J. A

BROWDE J.A.

HULL A. J.A.

FOR THE APPELLANT : MR C. NTIWANE

FOR THE CROWN : MR KILIKUMI-

JUDGMENT 8TH APRIL 1994

KOTZE J.A.

The appellant was charged in the high Court of Swaziland on two counts. The first, being one of murder in that on the 28th of January 1992 he wilfully, unlawfully and maliciously killed Sicelo Maziya by stabbing him with a knife. The second count was one of robbery in that on the same date he unlawfully assaulted Vusi Dlamini and by the use of force stole from him a pair of brown shoes, a bunch of keys and a nail clipper.

The appellant was, despite his plea of not guilty, convicted on both counts. As extenuating circumstances were found to be present he was sentenced to six (6) years count 1. and on count 2 to two (2) years xxx xxx now appeals against both this xxx

That the deceased referred to in count 1 met a violent death and was murdered is not in issue. He died as a result of penetrating incised neck wounds. What is in issue is whether it has been proved beyond reasonable doubt that the appellant perpetrated the offences in question.

I preface my remarks by mentioning that in considering the merits of this appeal I do not find it necessary and do not propose to pay regard to evidence given by the appellant after conviction, in his endeavour to establish the existence of extenuating circumstances. Appellate Division authority exists in the Republic of South Africa to the effect that such evidence may be taken into consideration in considering the guilt of an appellant in the course of his appeal. I refer in this regard to the case of S. v. Mavhungu 1981(1) S.A. 56 A.D. Mr Ntiwane argued on behalf of the appellant that this authority was not binding on the courts of Swaziland and was merely of persuasive value. In the view that I take of this matter, it is not necessary to resolve this question in the present appeal. I propose to confine myself to the evidence adduced by the Crown in its endeavours to establish the guilt of the appellant.

A witness, Mandla, was called on behalf of the Crown. His evidence was discredited and the Court a quo quite rightly disregarded this evidence in toto. In the result the case for the Crown stands or falls on the evidence of a single witness and an accomplice at that. The accomplice referred to is Simon Dube.

His evidence is xxxxxxxxxxxxxxxx

Court a quo xxxxxxxxxxxxxxxxxxxxxxx

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"Dube and the accused were watching television at Guys & Sons public bar in the evening in question. A young man walked into the bar. Dube expressed his admiration for the pair of shoes the young man was wearing. The accused replied there should be no problem to get the shoes. ' The young men spent a short while in the bar and left. When he left the accused told Dube to accompany him and follow the young man.

The two followed the young man and the accused told Dube that he would grab the young man and that Dube should remove his shoes.

The accused grabbed the young man and Dube indeed removed the pair of shoes.

The young man raised an alarm and was assaulted before the accused and Dube ran off.

Dube told the Court that he ran ahead of the accused and turned into a certain homestead.
He saw the accused running past, being followed by a man who was wearing a vest. He later saw the accused and the other man close to each other. He then heard the other man screaming.
Dube returned to the area of the public bar and met with the accused and Mandla.

He told the Court that he spoke to the accused and asked him about the man that had been chasing him and whom he had hear screaming. The accused xxxxxx had stabbed the xxxxxxxx

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The accused showed Dube a homemade knife with which he said he had stabbed the man.

The accused then warned Dube and Mandla not to report the incident to anybody. The young man who was robbed of his shoes is Vusi Dlamini. He told the Court of how he was gotten hold of and as to how his shoes were forcefully removed from him.

He told the Court that when he raised the alarm, the deceased whom he knew came out and chased his assailants.

Vusi did not see where the deceased and his assailants ended up."

Mr Ntiwane in a spirited argument submitted that the Court a quo erred in convicting the appellant on the uncorroborated evidence of Simon Dube. He relied heavily on the judgement in the High Court of Swaziland of Hannah C.J R.v. MANDLA HAMEBOY DLAMINI 1982-86 (1) SLR 348 where the learned Chief Justice said the following at page 387:

"The court, therefore, has to approach the evidence of the Prosecution witness 3 in two stages.

1. is she a credible witness?
2. If so, is there credible evidence independent of that which she herself has given

which implicates the accused and thus xxxxxxxxxxxxx

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It is not clear whether Hannah C. J. purported to lay down a rule of law that a conviction cannot ensue on the evidence of a credible accomplice unless it is corroborated from an independent source. If he so intended I respectfully disagree.

The approach which I consider should be applied is that set out by SCHREINER J.A in the well known South African case of R. v Ncanana 1948 (4) SA 399 at 405-6. I read that very important passage:

"The of rule practice which it was intended to state and which is consistent with, if it is not expressely approved in, decisions of this Court (See R. v. KUBUSE (1945, A.D. 189); R v. BREWIS (1945, A.D. 261); R. v KRISTUSAMY (1945 A.D.549) is that, even where sec. 285 has been satisfied, caution in dealing with the evidence of an accomplice is still imperative. The cautions Court or jury will often properly acquit in the absence of other evidence connecting the accused with the crime, but no rule of law or practice requires it do so.] What is required is that the trier of fact should fern himself, or if the trier is a jury, that it should be warned, of the special danger of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth . This special danger is not met by corroboration of the accomplice in material respects not implicates the accused but by proof aliunde the crime charged committed by someone that satisfied.

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the requirements of sec. 285 does not sufficiently protect the accused against the risk of false incrimination by an accomplice. The risk that he may be convicted wrongly although see 285 has been satisfied will be reduced, and in the most satisfactory way, if there is corroboration implicating the accused. [But it will also be reduced if the accused shows himself to be lying witness or if he does not give evidence to contradict or explain that of the accomplice. And it will also be reduced, even in the absence of these features, if the trier of fact understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of the accused is, in such circumstances, only permissible where the merits of the former as a witness and demerits of the latter are beyond question.

It is in my view clear that, where accomplice evidence is the basis of the Crown's case, grave error, to the disadvantage of the accused persons, may be caused by insisting, before there can be a conviction, that, save where the accused gives no evidence or false evidence, there must be corroboration in a respect implicating the accused."

In present case the appellant did not give evidence prior to his conviction. Moreover, the Judgment reveals that the learned Trial Judge adequately warned himself of the danger of entering a conviction on the evidence of the accomplice.

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That the trial Judge understood the perculiar danger inherent in the accomplice evidence is apparent from the judgment a quo.

T quote from the Judgment:-

" The Crown's case against the accused rests almost entirely on the evidence of Simon Dube. This witness ought to have been introduced as an accomplice witness in respect of count 2. He was not, however, introduced as such. The court has, however, heard his evidence and is satisfied that he should have been introduced as such: as an accomplice in respect of the

Count mentioned.

There is nothing magical about the introduction of a witness as an accomplice and the court,is in the circumstances, still obliged to approach his evidence with the necessary caution relating to accomplice evidence"

In another passage the learned trial Judge said:-

" The accomplice was most impressive as a witness. He tended to give more information and explanations than he was asked for. I did not. find this to be unusual of a witness who struck me as trying to make a clean breast and to disclose everything he considered related to the events of the 28th of January.

He stood up well to very close cross examination Overall, I found him to be a credit witness. I accept his evidence xxxx robbery and xxxxxxxxxxxxxxx thereafter xxxxxxxxxxxxxxx

It is clear from the fore going that although the conviction is based on the evidence of a single accomplice witness such evidence was evaluated with due care and was not contradicted. In my view the appeal against conviction fails.

The appeal against the severity of the sentence should also in my view be dismissed. I can find neither misdirection nor an irregular approach in regard to the sentences imposed which I do not consider to be excessive.

The appeals against the convictions and the sentences are dismissed. I have been authorised by my brother Browde to place on record that he concurs in this judgement.

(SGD)

JOTZE

J.A. I agree

(SGD)

BROWDE J.A

I agree. It is my own view that my predecessor the learned Chief Justice Hannah did not intend in the case cited by the learned Judge President to go so far as to say that as a matter of Law one could not convict on the uncorroborated evidence of an accomplice.

(SGP)

HULL A.J.A.