IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO. 10/98

In the matter between:

SIGWANE AND SIGWANE

VS

REX

CORAM : LEON J A

: STEYN J A

: TEBBUTT J A

FOR THE DEFENCE :

FOR THE CROWN :

JUDGEMENT

Steyn J A:

The two appellants were charged with the murder of one Lucy Maziya. The Crown alleged that they killed her by setting her alight and in doing so burnt her to death. Appellants pleaded not guilty but were, after evidence was tendered both by the Crown and the defence found guilty. Extenuating circumstances were held to be present and 1st Appellant was sentenced to 12 years' imprisonment and 2nd Appellant to 8 years. Appeals were noted by both Appellants against the convictions and sentences.

After hearing argument the Court upheld the appeals and set aside the convictions of both Appellants. We undertook to give our reasons today and these now follow.

The principal ground of appeal relied upon by Appellants concerns the question of the sufficiency of the evidence adduced at the trial and more particularly, the reliance placed by

the court a quo upon the evidence of a single witness, who so the defence alleges, was either an accomplice or what has been referred to as a "quasi-accomplice". In order to determine the soundness of this proposition it is necessary to set out the evidence.

The witness upon whose evidence the court a quo relied was one Mavela James Sigwane (Mavela). When he was called the prosecutor informed the Court that the witness was an accomplice and he was duly warned as such by the Court.

Mavela was related to the two accused. He also knew one Almon Mamba who was a friend of first Appellant. Almon was the third accused in the Court below but was acquitted shortly before

the end of the Crown case, there being no evidence linking him with the commission of the offence.

From his evidence it would appear that a night-vigil had been held at the home of one of Mavela's neighbors which he and 2nd Appellant had attended. When the vigil ended the two of them returned to the home of 1st Appellant to sleep. However when they arrived at the house, 1st Appellant asked them to accompany him to the home of the deceased. They refused at first but eventually agreed to go with him. On the way 1st Appellant called upon Almon to accompany them and the four persons, Appellants, Mavela and Almon proceeded to the house of the deceased. Upon arrival the two Appellants forced open the door of the house and they all went inside. Mavela says that this gave him and Almon a chance to run away. He ran to a nearby bush and hid there. However, the two Appellants followed him. He goes on to say:

"I was severely warned, and I don't know how I survived. I was told to go back to the deceased's homestead. When we got inside the house I found the deceased already dead My Lord. I was carrying a container of petrol which was given to me by accused no. 1 at the time he asked us to accompany him. Accused no.2 instructed me to pour petrol on the accused and I refused."

(This was the first occasion that the witness admits to carrying a 2 litre can of petrol.) Using a subterfuge the witness says he availed himself of the opportunity to run away and he again hid in a bush. Whilst running away he noticed that the house was on fire. After the flames had died down he returned to 1st Appellant's house and went to bed.

Mavela also gave evidence, which if accepted, could provide the motive for the tragic events of that night. It appears that one Patrick, the son of the 1st Appellant, had died in a motor accident the day before. It appears from the evidence of one Maphondo Simelane that the 1st Appellant had told the witness about a dream he had experienced. However the nature of the dream was not communicated to him. The contents of the dream were related by the witness Priscilla Dlamini. She says that on an occasion when she came from weeding the fields, she went to the house of the deceased, and whilst she was there visiting the deceased, 1st Appellant arrived. Her evidence then goes on to read as follows:

"He came, kneeled down and greeted us and we responded. He then told the deceased that he had come to see her (the deceased). He then told the deceased that he is being troubled by a dream, and he had come to relate his dream. He went on to tell the deceased that he kept on dreaming the deceased on the grave of his late child. He told the deceased that he was telling the truth but that if it was the truth 'then may God help him. He then stood up and left."

The witness was then asked what 1st Appellant's mood was and she says that "he didn't show any signs of anger." The witness confirmed that 1st Appellant's son had died in a car accident.

The issue of the dream the 1st Appellant had was also referred to in evidence by one Samuel Maziya. The deceased was his aunt - although in his evidence he also refers to her as his mother. He says that on "the 31st of March, he (the first Appellant) told me that in his dreams he could see my mother (the deceased) walking to his dead child's grave My Lord, and he will see what he will do about it as he had informed the deceased about his dreams." The witness confirmed that first Appellant "didn't show any signs of anger when he said this." (The dream deposed to by this witness must have occurred before the death of Patrick or about the 20th of April).

According to the post mortem report of the pathologist he had come to the conclusion that the cause of death was severe burns which consumed the whole body. However in cross-

examination he said that it was difficult to ascertain the cause of death. It was also possible

that "the body could have been killed and then burnt. So it was not possible to ascertain what actually caused the death of the deceased."

An application for the discharge of the two Appellants was refused and they both gave evidence in their defence. First Appellant says that on the day in question, i.e. the 21st April, he was at home erecting a tent for shelter for the people who would be coming for the night vigil in respect of his late son who had died in a motor accident. He was assisted by both Mavela and Almon. They completed this task at "around four or five in the afternoon." He took a shower and went to his house to sleep. The following morning he was informed that "there was an incident that had taken place..." This was of course a reference to the house of the deceased that had been set alight. He slept all night, never left his house and did not commit the deeds attributed to him by the witness Mavela. The last time he saw the latter was at about five in the afternoon of the day that the tent was erected. He conceded however that it was true that he had bad dreams and that he "would dream the deceased on top of my son's grave." He confirms Priscilla's evidence that he informed the deceased about his dream and testified in this regard as follows:

"I wanted us to solve that matter in a peaceful manner because I believe that if one has a dream about a certain person it is normal that you approach that person and tell him what you have dreamt about."

He explained the reason why he informed the deceased about his dream in the following terms:

"In our culture as I grew up I found that it is normal that when you dream about somebody you go and inform him about that, then the dream will not come anymore..."

He emphatically denied that he believed that his grandmother (the deceased) had bewitched his son and caused his death.

Similar evidence denying participation in any assault upon the deceased was given by the second Appellant.

In his case however, he alleges that he attended the night vigil until 5am. There was an alarm concerning the fire at the deceased's homestead during the night of his vigil. He went there to find the deceased's hut in flames. He, like first Appellant, denied participation in an assault upon the deceased or having burnt her body as alleged by Mavela.

This was the case for the defence. The Court in the exercise of its discretion decided to call Almon Mamba, who, it will be recalled, had been accused no.3 in the case and had been discharged because there was no evidence linking him with any actions associated with the death of the deceased.

In seeking to adduce evidence from Almon concerning the death of the deceased the Court addresses the witness as follows:

"JUDGE: You are Almon Mamba?

DW3: That is correct My Lord.

JUDGE: You were previously an accused person in this case?

DW3: That is correct My Lord.

JUDGE: But I found at the end of the Crown's case that there was no evidence against you.

DW3: That is correct My Lord.

JUDGE: But one of the witnesses has given evidence which suggests that you may be able to throw some light on how the deceased in this matter came to die. In fact, you have heard the evidence of Mavela James Sigwane. Now I want to hear from you what you know at the death of the deceased. And you must understand that you have been found not guilty and that nothing you say can render you liable for the death of the deceased. Now I want to know how the deceased came to die?"

The witness responded and said:

"I know nothing about the death of the deceased, My Lord and I was not there."

The Judge confirmed with the witness that this is all he has to say. No cross-examination or any questioning was undertaken either by the Court or Counsel for the Crown or the defence and the witness was excused.

It is on this evidence that the Court convicted the two Appellants. It is important to record however that during the address by Crown Counsel the Court expressed the view that Mavela

was not an accomplice. This view the Court repeated during the address by Counsel for the defence and finally also in its judgement. The relevant passage reads as follows:

"The only evidence therefore is that it was the two accused who murdered the deceased is that of Mavela. The defence argued that he was an accomplice, and that applying the cautionary rules which are to be applied when considering accomplice evidence this testimony was sufficient upon which to convict the two accused persons. Mavela was not, however, an accomplice. He did not participate in the commission of the offence except perhaps to the extent that he accompanied the accused to the home of the deceased and assisted them by carrying the container of petrol. These acts, however, amount to no more than to acts of preparation which he performed under duress. When the time came to commit the offence he distanced himself from the accused. There is nothing to contradict him in what he says, and I accept that he did not participate in the killing of the unfortunate woman. It is of course competent to find the accused persons guilty on the single evidence of a witness. But in order to do so his evidence must be satisfactory in all material respects."

The Court then proceeded to examine Mavela's evidence and concluded as follows:

"Whatever criticism there may be they are out-weighed by the consideration that there was no reason for him to falsely implicate the accused who are his kin. He gave his evidence in a convincing manner and I find him to be credible and trustworthy sufficiently to the extent that the weak denials of the accused must be rejected as being untrue beyond reasonable doubt."

The Court concluded its judgement by saying the following:-

"In accepting his evidence it seems that it is relevant that he will still after this trial be a member of the family and continue to live in the community. If it is general knowledge that he was falsely implicating the two accused his life in his community would not be pleasant. In view of the tendency which I have observed from the members of the community to close ranks, as I have said, to suppress the truth - his testimony is a brave heart. For these reasons I find that it is proper to convict the accused on the evidence of the sole witness, and they are accordingly found guilty of murder as charged."

In so far as the witness called by the Court, Almon Mamba, is concerned the Court said the following:

"At the end of the defence case, Counsel for the defence indicated that he wishes to call Almon Adina Mamba, the third accused, who had been discharged at the end of the Crown case. For some reason this witness was not available to defence counsel and he closed his case without calling him. After the close of the defence case I had him called. He claimed that he knew nothing of the events surrounding the death of the deceased. This of

course is again a contradiction of the evidence of Mavela as Mavela placed him at the scene of the murder albeit without implicating him as participating there in. This is an example of what happens all too frequently in trials of this nature. A murder is committed but the members of the community close ranks to withhold the truth. I consider that Almon was not telling the truth."

I do respectfully have difficulty with various aspects of the Court's reasoning cited above. I deal with the rejection of Almon's evidence first. It must be recalled that although Mavela did not attribute any active role in the murder of the deceased to Almon, he clearly implicated him as one of the party that set out on the expedition - the purpose of which all of them must have known was to cause harm to the deceased and to set her house and/or herself alight, using the petrol carried by Mavela. According to Mavela, Almon was present at the scene, certainly up to the point in time that the two Appellants forced open the door. When Almon is called to testify he denied that he was present and averred that he knew nothing about the death of the deceased. No questions to challenge the veracity of this denial are directed at the witness. On what basis, other than a pre-disposition to accept Mavela's version, this evidence can be summarily rejected, is difficult to comprehend. There was no evidence of any kind confirming Mavela's version that Almon was present. In view of the fact that his evidence is unchallenged it is unjustified to reject it without any reason other than the speculative view that his response is "an example of what happens all too frequently in trials of this nature. A murder is committed but members of the community close ranks to withhold the truth." This reason for the rejection of his evidence was never put to Almon, neither was any evidence adduced in this case to justify this assumption. In these circumstances how can it be found that Almon's statement that he wasn't present could not possibly be true? Why is Mavela's evidence that Almon was present more probable that the untested denial of Almon that he was not? How can it be found, with judicial certainly that Mavela's version is to be preferred to that of Almon?

The approach of the court a quo to the evidence of Mavela appears to me to be flawed in another important respect. The Court finds him not to be an accomplice. This it can only do on the basis of the acceptance of his evidence that his participation was as limited as he averred. However in order to do so and in view of his participation in the preparatory acts and in accompanying the killers, the court has to caution itself that he may well have sought

to minimise his own role in the events and that he should, for the purposes of the evaluation of the acceptability of his evidence, be regarded as an accomplice. It would defeat the whole object of the cautionary rule if a court for the purposes of determining whether a person who has admittedly committed acts which shows that he may be an accessory either before or after the fact is an accomplice, bases that decision on an a priori acceptance of his evidence. The correct approach is for the trier of fact to use the same caution in assessing the reliability and creditworthiness of the witness as it would if the witness were to concede that he indeed was an accomplice in the fullest sense of the word.

Ample authority is to be found for this approach. The matter is summarised as follows by HOFFMAN AND ZEFFERT in THE SOUTH AFRICAN LAW OF EVIDENCE (4th ED.) AT page 576.

"In some cases the term quasi-accomplices has been used to describe persons who are not technically accomplices but appear to know a good deal about the offence and have some purpose of their own to serve in giving evidence. The reasons for the accomplice rule apply equally to such persons and similar circumspection ought therefore to be shown in dealing with their evidence."

In R VS NHLEKO 1960(4) SA712 (A), Schreiner J A, held in terms that accessories after the fact should be treated in the same manner as accomplices. At 722 the learned Judge says:

"An accessory after the fact ex hypothesi has identified himself with the actual perpetrator and probably has learned from him the circumstances of the crime. Most if not all of the considerations that lead to caution in the one case apply in the other.

See also in this regard the summary in COMMENTARY ON THE CRIMINAL PROCEDURE ACT by du Toit et al 24 - 5 where the learned authors say the following under the heading:

"THE MEANING OF ACCOMPLICE."

"For the purpose of the cautionary rule the courts have given the term 'accomplice' a more liberal construction than the one assigned to it under the section. Thus it has been held that where evidence is given against the accused by a co-accused it should be approached with caution even where it is not technically the evidence of an accomplice (S VS RADLOFF 1978(4) SA 66(A) AT 74). The cautionary rule, moreover, applied irrespective of whether the accomplice has been called as a witness by the State or testifies as a co-accused in his own defence (S VS JOHANNES 1980(1) SA531 (A) AT 532 - 3; S VS DLADLA 1980(1) SA526 (A) AT 529). Accessories after

the fact should be treated in the same manner as accomplices, as '[m]ost, if not all, of the considerations that lead to caution in the one case apply in the other' (R VS NHLEKO 1960(4) SA712 (A) AT 722F). The evidence of an informer, whether or not he may de jure be considered to be an accomplice, may also attract the exercise of caution where he has a possible motive falsely to implicate the accused or where by reason of his participation in the crime he is in a position to deceive by convincing description (S VS MALINGA & OTHERS 1963(1) SA692 (A) AT 693-4. Where a single witness' evidence is of such quality that it is an open question whether he should be treated as an accomplice but where the danger of a deceitful substitution presents itself the evidence should be approached in the same way as that of an accomplice: S VS HLONGWA 1991(1) SACR 583(A)."

Indeed Counsel for the Crown conceded before us that the court a quo erred in not applying the cautionary rule in the evaluation of the evidence of the single witness Mavela. It follows that we are obliged to re-evaluate the evidence applying this rule of practice and that we can only uphold the convictions if we are satisfied that a Court properly instructed would inevitably have convicted.

The landmark judgement on the cautionary rule remains that of Schreiner J A in R VS NCANANA 1948(4) SA399(A). At page 405 the Court outlines the approach in the often cited passage with reads as follows:

"The rule of practice which it was intended to state and which is consistent with, if it is not expressly approved in, decisions of this Court (See R VS KUBUSE 1945 A.D. 189; R VS BREWIS 1945, A.D. 261; R VS KRISTUSAMY 1945 A.D. 549 is that, even where Section 285 has been satisfied, caution in dealing with the evidence of an accomplice is still imperative. The cautious 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 to do so. What is required is that the trier of fact should warn 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 truth. This special danger is not met by corroboration of the accomplice in material respects not implicating the accused, or by proof aliunde that the crime charged was committed by someone; so that satisfaction of the requirements of Section 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 Section 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 a 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 accomplices and rejection of the accused is, in such circumstances, only permissible where the merits of the former as a witness and the demerits of the latter are beyond question."

This is the approach the Court a quo should have adopted in evaluating Mavela's evidence. Its failure to do so constitutes a misdirection. Crown Counsel also correctly conceded that there was no evidence implicating the two appellants with the commission of the offence other than that of Mavela. He sought to argue that the evidence of the dream, coupled with the merits of Mavela as a witness and the demerits of the two appellants as witnesses justified the convictions.

We are unable to uphold these contentions. In the first place the evidence concerning the dream and first Appellant's response thereto is at best equivocal and not necessarily only consistent with a motive for killing the deceased. Moreover, the deceased gave an explanation of his conversation with the deceased which cannot reasonably be rejected as untrue.

Whilst there are some conflicts in the evidence of the two appellants, the testimony of Mavela is not free of imperfection. As pointed out earlier in this judgement he was not initially frank in his evidence concerning what the purpose of the expedition was and that he was carrying a 2 litre can of petrol and why he did so. He certainly never volunteered what he understood the mission on which he was setting out was.

Certainly on a reading of the evidence it is impossible for this Court to find that the evidence of

Mavela is to be preferred to that of the two Appellants. The rejection of Almon's evidence, which conflicts with that of Mavela, can also not be sustained. If his version cannot legitimately be rejected it must also cast some doubt on the acceptability of Mavela's version of the events and who participated in them.

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For all these reasons it was clear that the convictions could not be sustained. We accordingly upheld the appeal of both appellants and set aside the convictions and sentences.

J. H. STEYN J A

I agree:

R.N. LEON J A

And so do I:

P. H. TEBBUTT J A

Delivered in open Court this 1st October 1998.

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