

IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.23/99

In the matter between:

HAWUZILE MAZIYA

Vs

REX

CORAM ; LEON J P

: STEYN J A

: TEBBUTT J A

FOR THE APPELLANT : MR. MABILA

FOR THE CROWN : MS. LANGWENYA

Tebbutt J A:

The appellant was convicted in the High Court of murder with extenuating circumstances and sentenced to 15 years imprisonment. He now appeals to this Court against both his conviction and sentence.

The appellant was convicted basically on the evidence of a witness one Bhani Maziya, a cousin of the appellant to whom in order to avoid confusion, because he and the appellant have the same surname, I shall refer hereinafter merely as Bhani.

The deceased, Ngwabela Jotham Vilakati, a 65 year old man, according to the report of the pathologist, who conducted a post-mortem examination on his body, died of multiple stab wounds. These, according to Bhani in his evidence before the trial court, were inflicted by the appellant. Bhani's evidence was that he and the appellant had that day slaughtered a pig using a knife belonging to the appellant's father and had gone out together to sell the meat to people in the neighbourhood. They eventually came to the

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house of a woman, Lomagugu Doreen Zungu. Appellant and Bhani asked her if they could roast some of their meat on a fire on which she was roasting some liver. When the liver was ready, it disappeared. She said she asked about its whereabouts from appellant who said he did not know where it was. One of the people present there pointed out that the appellant had taken it and hidden it under his seat. The deceased, she said, arrived playing his guitar and criticised the appellant and the others present there saying that they were making a commotion and that they "were dirty". Appellant started swearing and said to the deceased "do not talk because we will cross the river together". The deceased then left. Appellant and Bhani left shortly afterwards. Ms. Zungu said that Bhani was present when the altercation between the appellant and the deceased took place.

Bhani said that as they were following the deceased after leaving Ms. Zungu's house, they came across a man known as Mkhonta. While he and Mkhonta were talking to one another appellant attempted to interfere with a young woman that they met along the way. Appellant was in a dangerous mood. He, Bhani, hung back but as he proceeded on his way home he

came across the appellant standing over the deceased. The latter appeared to him to be dead. This notwithstanding, however, the appellant hit the deceased with a guitar the latter had been carrying and also, so Bhani testified, stabbed the deceased several times. Appellant then asked Bhani to help him throw the deceased's body into the river. Bhani said he refused to do so. He at no stage touched the deceased. Bhani said he then went home where appellant joined him. Appellant was still in a dangerous mood. As he was afraid of the appellant, so Bhani testified, he went off to a night vigil that was taking place at the house of one Enock Gamedze where appellant also later appeared and addressed those present and made a donation of E2.50 to church funds.

The only direct evidence that it was the appellant who had stabbed the deceased was that of Bhani and it was, as stated above, on Ms evidence that the trial court convicted the appellant. Appellant gave evidence in his defence. He denied having stabbed and killed the deceased. It was, he said, Bhani who had lollod him. The trial court rejected the evidence of the appellant, who the trial court described as an "unmitigated liar" and accepted that of Bhani who, according to the trial court, had come through a lengthy and searching cross-examination unscathed except for minor contradictions.

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The trial court treated Bhani's evidence on the basis that he was an accomplice witness and applied to his evidence the so-called cautionary rule in regard to accomplice evidence.

The classic statement of what has been described as "the common rule of practice" in dealing with accomplice evidence is contained in the judgment of Schreiner J A in the South African Appellant Division in the case of REX VS NCANANA 1948(A) SA399 (A) at pages 405-406 where the following appears:

"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 the 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.... The risk that he may be convicted wrongly ...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 accomplice 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 statement of Schreiner J A has been applied with approval by this Court in JEREMIAH PETROS DLUDLU VS THE KING CRIMINAL APPEAL

NKO.12/93, a judgment referred to, again with approval, in many subsequent cases. From the foregoing, it is clear that corroboration of an accomplice must be corroboration implicating the accused person in the commission of the crime and that while the danger of convicting an accused person will be reduced where the latter is a lying witness, the court must appreciate that rejection of his evidence and acceptance of the accomplice is only permissible where the merits of the accomplice as a witness are beyond question.

Can that be said to be the position in this case? That the appellant was indeed an unmitigated liar is without question. From a reading of the record of his evidence, it is clear that he was evasive, untruthful on many crucial points and spoke obvious nonsense when he found himself in difficulty during cross-examination. The learned trial Judge

found both Ms. Zungu and Gamedze to be truthful and reliable witnesses and this Court can from the record find no fault with that conclusion. Appellant contradicted Ms. Zungu on what had happened at her house in regard to the liver and he also denied the positive evidence of Gamedze that he attended the night vigil. Appellant said he was never there. He also, as an obvious afterthought, said he saw Bhani and the deceased fighting with their fists - a fact that, despite his defence counsel's very thorough cross-examination of Bhani, was never put to the latter.

Bhani's evidence, however, is also full of imperfections. Questioned about his own past, he was initially evasive and reluctant to admit his brushes with the law until he was forced to concede that he had committed house breakings and thefts. He was, in his own words, a "seasonal thief. He also contradicted Ms. Zungu saying that he was not present when the altercation between the deceased and the appellant took place. Mr. Mabila, in a most able argument, the heads of which were prepared by him at very short notice, he having only been instructed a matter of three days before the hearing of the appeal, pointed out a number of other contradictions in Bhani's evidence. I need not set them out here in the light of certain other facts to which I will now advert and which, in my view, are destructive of the Crown's case.

In the first place, it was the evidence of Gamedze that when Bhani and the appellant arrived at the night vigil at his house the clothes of both of them contained bloodstains. Bhani said his clothes "would not have had blood stains". The Crown, however, called a forensic expert, Captain H.C. Botha, who examined the clothing the appellant and Bhani wore on the night in question. She found no blood on appellant's clothing but found blood on Bhani's clothing. She was, however, unable to say positively if this was human blood. Faced with this evidence, Bhani who, as stated, first denied that he had any blood on his clothing, then averred if there was any blood it must have come from the meat of the pig they had slaughtered that day and was in a bag he was carrying when they went to Ms. Zungu's house. The latter however, denied having seen Bhani carrying a bag. Secondly, Gamedze testified that he was present when the appellant and Bhani were arrested. His evidence reads as follows:

"PW4; The preacher had brewed some home brew in his homestead and the police found Bhani in that homestead. And the police called him and ran away from the police... in fact the police chased after him and he outran them. Then the police asked us to go along with them to Liya's place where it was alleged

Hawuzile was. We found Hawuzile there, they arrested him and went away with him. After the police had gone away with Hawuzile, Bhani re-emerged. Then the community suggested that we catch Bhani. We caught him and we took him with us. I then asked Bhani why he was running away from the police and he said the reason was that they had killed Vilakati. Then the police took him. CC: When? You said the police had gone, when did they now take him? PW4: We sent one person to call the police and whilst we were still going to the police, the police met us along the way when we were taking him to the police. CC: When he said that they had killed Vilakati, did he say with whom they had killed Vilakati?

PW4: He did not say, he just said they had killed Vilakati but did not say with whom.

Bhani admitted in his evidence running away from the police but said he had done so because he had earlier broken into a house and stolen a bed and thought that the police wanted to arrest him in that connection. Gamedze's evidence as to what was said by Bhani at the time of his arrest was corroborated by Constable Gilbert Mamba who was present at the time. His evidence was the following:

"DC: ... You then saw the accomplice witness Bhani Maziya.

PW5: That is correct My Lord.

DC: As soon as he saw you he ran away?

PW5: That is correct My Lord.

DC: And you ran after him?

PW5: That is correct My Lord.

DC: And he outran you ?

PW5: That is correct My Lord

DC: Subsequently he was arrested by the members of the community and brought to you?

PW5: That is correct My Lord.

DC: Did you ask him why he ran away from you in the first place?

PW5: yes, we asked him My Lord

DC: What was his reply?

PW5: He said they killed Mr. Vilakati".

Constable Mamba was not an impressive witness. He was, however, a witness for the Crown and as stated, his evidence just quoted was also what Gamedze had told the Court.

More important, however, even than that evidence is Constable Mamba's further evidence as to what Bhani had told him. He said:-

"DC: He (Bhani) said that it was Hawuzile Maziya (the appellant) who was the first one to stab Mr. Vilakati (the deceased) and then later on he also took the knife from him and continued.

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JUDGE: Wait, wait., you are saying that he said it was Hawuzile who first stabbed the deceased?

PW5: That is correct My Lord.. O

JUDGE: And then...?

PW5: And then later on he took the knife and continued with the stabbing.

JUDGE: Who is that one? The accomplice witness?

PW5: Yes.

JUDGE: He then took the knife from the accused and proceeded to stab the deceased?

PW5: Correct My Lord.

DC: Did he tell you how many times the accused stabbed the deceased?

PW5: He said he had forgotten how many times but he said that he stabbed him.

DC: Did he tell you the number of times the accomplice stabbed the deceased?

PW5: He said he had forgotten as to how many times since he was drunk at the time.

DC: The accomplice witness told this court that he never stabbed the deceased at any moment, once or any number of times. Are you telling the truth or he told this court the truth?

PW5: I am telling the court the truth.

JUDGE: And the accomplice witness was not telling the court the truth?

PW5: He was not telling the truth that he did not stab the deceased

DC: The accomplice witness also told this court that he never came close to the

body of the deceased. Was he telling the truth?

PW5: He was not telling the truth My Lord".

In the light of this evidence and in the light of the fact that he had blood on his clothing, Bhani's evidence that he had not taken part in the assault on the deceased and in fact never touched the deceased, should not have been accepted by the trial court.

Indeed, having regard to the evidence of what he said to Constable Mamba it would, in my view, not be possible for this Court to find beyond reasonable doubt that it was the appellant who caused the death of the deceased. Even if he had participated in the assault on the deceased which, while it may be probable, cannot be found beyond reasonable doubt to have occurred, it certainly cannot be found beyond reasonable doubt that it was his part in such assault that actually caused the deceased's death.

It follows that the appellant was wrongly convicted of the murder of the deceased. His appeal, accordingly succeeds and his conviction and sentence are set aside.

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P. H. TEBBUTT J A

I AGREE : R. N. LEON J P

I AGREE : J. H STEYN J. A.

Delivered on this 3rd day of December 1999.