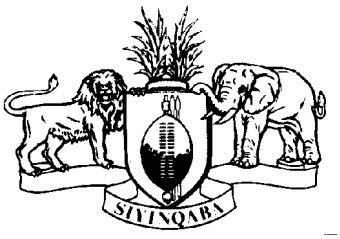

IN THE COURT OF APPEAL OF SWAZILAND

APPEAL 9/2001

In the matter between:

ELIZABETH MATIMBA

1ST APPELLANT

JOYCE NTOMBIFUTHI MDLULI

2ND APPELLANT

AND

REX **RESPONDENT**

CORAM : BROWDE JA
: TEBBUTT JA
: BECK JA

JUDGMENT

Browde JA:

The two appellants were charged before Masuku J in the High Court. It

was alleged in the indictment that on or about the 13th May 1998, and at the Government Hospital Nurses' Home near Mbabane, the two appellants acting in common purpose, did wrongfully and unlawfully administer a certain drug to Fikile Matimba, who was the pregnant with a living foetus. With intent thereby to procure the miscarriage of the said Fikile Matimba, and did as a result of the said drug cause the death of the said foetus and its expulsion from the body of the said Fikile Matimba.

Both accused pleaded not guilty but both were convicted and each was sentenced to five years' imprisonment. This appeal has been brought by both appellants against their convictions and sentences. In the judgment that follows I shall refer to the first appellant as A1, to the second appellant as A2 and to Fikile Matimba as Fikile or PW7.

The learned Judge in his judgment dealt with the evidence in comprehensive detail and with great care and it is accordingly not necessary for the purposes of this judgment to recount the evidence exhaustively. Suffice it to say, as an introduction to the facts of the matter, the following:-

(i) At the time of the events relevant to the case Fikile had

had a physical relationship with Thamsanqa Gwebu (PW1) as a result of which she had fallen pregnant.

(ii) Fikile's mother, A1, came to know of the pregnancy and was distraught by it. She called on PW1's family and told them that it would lead to the disintegration of her family since her husband, who was a short-tempered man, would not accept what PW1 had done to his daughter..

(iii) As a result of this rift between the two families, and at the request of PW1's father, one Robert Zwane (PW2) was asked to convene a meeting of the families with the objection of bringing about reconciliation between them.

(iv) The meeting took place and what occurred there succinctly put was the following. PW1 told the full story of his relationship with Fikile who confirmed that that relationship had caused her pregnancy. She stated that she was no longer pregnant and when asked what had happened to the pregnancy she kept quiet and looked at A1. I should here interplate that PW2 was a member of what are referred to as "community police". A number of his fellow members were present too, and it can be accepted that at least some of them were carrying knob-sticks, which are their traditional "weapons". The meeting was marked by singing and praying which appear to have moved Fikile's father to request A1 to say what she knew about the pregnancy. According to PW1 the response of A1 was to the effect that she had arranged for Fikile to be "cleaned" by a nurse in Mbabane and that she had buried the foetus at her (A1's) homestead. He went on to say she had even mentioned the name of the nurse i.e. the name of A2. This aspect of PW1's evidence does not appear to have been challenged in cross-examination but Mr. Vilakati, who

appeared for both appellants in the court below, made a rather tentative suggestion that A1's statement was made under duress. The person who, it was suggested threatened A1 was PW2. This was also said to have been the duress exercised on PW7 who, when A1 had finished addressing the gathering, then proceeded to recount in detail how it came about that A1 arranged for the abortion to be carried out by the nurse in Mbabane and the procedure which led to the expulsion of the foetus. The learned Judge found that the evidence that PW2 had threatened A1 and PW7 was not acceptable and fell to be rejected as false. I agree with the learned Judge. PW2 had nothing to gain by forcing anyone to make false statements. It is common cause that the meeting was called with the object of reconciling the two families which could hardly be attained by threats against one side. The atmosphere akin to a religious meeting which I have already referred to is also incompatible with the evidence of the dire threats which, in any event were described by A1 only in re-examination and appear to have been an afterthought. It must follow that at the meeting PW7 made a clear statement that A1 had been a party to the performance of the abortion and that at best for A1 she said was that she had buried the foetus. The evidence is not clear that she had admitted to having had PW7 "cleaned" since PW2 did not corroborate PW1 in this respect. What is clear, however, is that A1 raised no demur when PW7 gave her evidence and certainly made no mention of a natural miscarriage which, as will be seen, became her defence at a later stage.

When PW7 had finished telling the gathering how the abortion had

been performed and PW2 had suggested that her relationship with PW1 should continue, some if not all of the persons there present then repaired to A1's homestead. Although A1 at one time said in evidence that it was members of the community who exhumed the foetus, she later admitted that she not only showed them where she had buried it but also that she had herself dug it up. PW2 described the foetus as having what appears to have been a partly decomposed lower body but with a still recognisable upper body and head.

In her evidence in the court a quo A1 denied that she had been a party to or even contemplated the procurement of an abortion for PW7. She stated that PW7's pregnancy had terminated when, at home, she had spontaneously miscarried and in the process there was expelled a jelly-like substance. A1 also stated that she had told that to the meeting arranged by PW2. This was not suggested to any of the witnesses who deposed to being there, was obviously an effort to bolster her defence and must be rejected as false. That she never contemplated an abortion must also be rejected. Two witnesses gave the lie to that, namely Nomsa Mazibuko (PW8) and Hleziphi Fakudze (PW9). The evidence was that on a particular PW9 was in the company of A1 when they saw PW8 in the street. PW9 called her and, when the three were together, PW9 and A1 were weeping and told PW8 that PW7 was pregnant. A1 said she has seriously considered the matter and thought of "aborting the child". PW8 warned that that would be a crime to which A1 responded that she "had decided to do it and that she also told God that she was going to do it". PW8 attempted to dissuade her from that course. On another occasion, at the request of A1, PW8 spoke to PW7. The latter was crying and when asked why, she said "because I do not want to go to where my mother says I should go". PW8 then reported that to A1 who, according to PW8, became angry and started shouting. She was angry because PW7 "would miss the bus" and said that if PW7 did not want to go to where she was taking her it meant that her home or her marriage was being destroyed. She went on to say she (A1) would have to leave home as her husband would kill her. This evidence leads to the unassailable inference that not only did A1 contemplate an abortion for PW7 but that she was intent on ensuring that such a procedure was carried out. The further Crown evidence was that of PW9. She deposed to A1 telling her about the pregnancy and "she went on to say since that is her problem she was contemplating and thinking of going and aborting, causing an abortion on Fikile, or terminating the pregnancy".

PW9 also attempted to dissuade her from such a course but was met with the response, that A1 had taken a decision which she

intended carrying out. PW9 corroborated PW8's evidence of the meeting in the street and there can therefore be no reasonable doubt regarding A1's stated intention to procure the abortion. There could be no valid suggestion that these two witnesses, apparently friends of A1, would have conspired to ensure she was convicted of the crime charged. IncidentallyPW9 also described how A1 wept and how she herself wept in sympathy with A1.

Finally there was the evidence of the doctor who examined PW7 after the foetus had been expelled from her body. He was of the opinion that the damage to the cervix which he observed made it highly likely that an abortion procedure had been carried out. The doctor also testified that the condition of the uterus of PW7 indicated that she had been pregnant (which is common cause) and that the pregnancy had been terminated. While under cross-examination the doctor conceded that it was "possible" that PW7 had had a miscarriage (i.e. without outside interference) it is clear from his evidence that he considered that possibility to be inconsistent with his physical findings.

This brings me to a consideration of the veracity of PW7's version given in evidence in the court a quo that the foetus had been expelled by natural means during a small bleed she had experienced in the bathroom. This version was, of course, contrary to that given by her at the meeting where, if it were true, one would have expected her to have given it. That would have been the best way of achieving the reconciliation between the families. The worst way was to blame her mother for forcing her to have an abortion. Quite apart from that however is a statement made by PW7 to the police when she was taken to them by PW2. In this statement she gave a circumstantial account of her pressure exerted on her by A1 as well as a day by day description of what was done to her by A2. This statement, in so far as it adversely affects the appellant is hearsay and consequently is not admissible evidence against them. When she was called as a Crown witness PW7 deviated in very material respects from that statement which had obviously been relied on by the Crown in its decision to call her as a witness. As a result she was impeached and was declared a hostile witness. She stated in response to questioning that the detail in the statement was largely furnished by PW2. This has only to be stated to be rejected as absurd. PW2 could not have known anything about her treatment at the hands of either appellant and consequently it is clear, as the learned Judge in my judgment correctly found, that the "switch" in her evidence was a belated attempt to shield her mother from the possible consequences of the trial. The vrsion of the natural miscarriage is, for the above reasons, rejected as false.

The learned Judge also dealt in his judgment with certain letters that had been written by PW7 to PW1 before and after the date on which the abortion was alleged to have taken place. The contents of the letters were basically to the effect that PW7 was being coerced by A1 to undergo the abortion procedure, that she was unwilling to cooperate but that she could not resist her mother's insistence. The letters were handed into court as exhibits and were treated by Masuku J as evidence against A1 in the following terms:-

> "There was also the evidence of PW1 regarding the letters. PW7 mentioned that A1 was forcing her to commit an abortion and later informed PW1 that A1 had prevailed and she considered herself a murderer. All that A1 said in relation to these letters is that she did not agree with them. That was not enough to rebut such strong evidence against her".

This conclusion of the learned Judge overlooks, in my opinion, that the contents of the letters, even although they may not, strictly speaking, be hearsay – since both PW1 and PW7 were called as witnesses – did not constitute evidence of the truth of their contents. In HOFFMANN AU ZEFFERT ON THE SOUTH AFRICAN LAW OF EVIDENCE 4TH ED at page 390 reference is made to the case of WEINTRAUB V OXFORD BRICKWORKS LTD 1948(1) SA 190 (T) in which Price J stated –

> "A letter is only evidence of the fact that it was written by the person who wrote it and that that person said what the letter contains. It is not evidence that what he said in the letter is

true”>

As I am in respectful agreement with that dictum I am of the opinion that Masuku J’s approach was a misdirection insofar as he regarded the contents as factual evidence against A1 which required rebuttal from her. In the result, however, this did not so affect the judgment a quo as to make it wrong. I have set out my reasons for coming to the conclusion, as I do, that it was proved beyond reasonable doubt that A1 was guilty as charged.

Thus far I have not dealt wit the case against A2. It was admitted by Ms. Dlamini and I think correctly so, that when the Crown case was originally closed there was no evidence against A2. Application was then made for the discharge of both accused which was refused by the learned Judge. Thereafter the Crown applied to re-open its case in order to lead certain evidence relevant to the case against A2 to which I shall advert below. This application was granted and the evidence led.

Before us Mr. Maziya who argued the appeal on behalf of both appellants ably and having obviously given the record thorough consideration, submitted that the learned Judge a quo erred by allowing the Crown to reopen its case and lead further evidence. It is clear from the authorities to which we have been referred and particularly PHIPSON ON EVIDENCE 10TH ED. PARA 1558 that this question falls within the discretion

of the judge to decide. Therefore, unless the discretion is exercised in a manner which causes irremediable prejudice to the accused, an Appeal Court will be slow to interfere. In this case even although, as I have said, there was no evidence against A2 I do not think Masuku J's decision caused prejudice to A2 in the sense that it deprived her from properly presenting her case. Although it can cogently be argued, as was done by Mr. Maziya, that there was no good reason advanced by the Crown for its failure to lead the evidence it now sought to do before it closed its case, the decision to permit such evidence did not result in prejudice to the accused in the sense which would have precluded the Crown from leading it. It has often been judicially stated that a criminal case is not a game and

therefore if Masuku J thought that it was in the interests of justice to hear the evidence his decision to do so cannot be faulterd.

The evidence which was then led was that of two daughters of A2. Lucy Masango (PW11) and Hazel Mashaba (PW12). PW11 was a scholar in 1998 and stayed with her mother. She said that one day she saw a female sitting in her mother's sitting room – she identified that person in court as being PW7. She admitted as having seen PW7 "very briefly" and having "just glanced" at her. PW11 then stated she saw "the person" on a second occasion and under cross-examination admitted she once again had "just a glance" at her. This evidence in my opinion is too uncertain an dthe observation by the witness of PW7 too fleeting to prove PW7's presence in the house beyond reasonable doubt. The learned Judge however, took into consideration as evidence against A2, what PW2 stated in evidence was what PW7 had said when she addressed the meeting of families above referred to, namely that A1 ahd taken her to Mbabane and there introduces her to A2. That statement made by PW7 in the absence of A2 was a hearsay statement as far as A2 was concerned and accordingly could not be used as evidence of its truth against A2. Consequently PW11's evidence, in my opinion, took the Crown case no further.

PW12 gave evidence regarding several obstetrical instruments and other items of a medical nature which she said had been in her mother's house for a considerable time. There is no reason to disbelieve PW12 even although A2 denied that evidence. PW12 went further and stated that her mother, from gaol, asked her to remove the items and keep them in a safe palce. She did this, but they were discovered by the police.

In regard to PW12 also there is no reason to think she would lie in giving evidence adverse to her mother. Consequently I am of the opinion that possession of these items by A2 was properly proved. It appears to me however that the inference that therefore A2 committed the abortion on PW7 beyond reasonable doubt is not legally justifiable. There is a strong suspicion that A2 ran what Masuku J referred to as "a private surgery" but in my judgment it was not proved by admissible evidence beyond reasonable doubt

that she operated on PW7.

There only remains for me to make one further observation on the merits of the Crown case against A2. In her statement to the police PW7 gave a version of her treatment in the abortion procedure which appears to have lasted for about 5 or 6 days. It also seems that in that time PW7 slept on a mattress in the house of the person who carried out the operation. If that is so then that was the house of A2. It is surprising that PW12 did not have a better opportunity to identify PW7 than the two "glances" she described.

In the result I find that the Crown failed to prove the charge against A2 and her appeal succeeds.

It remains for me to consider A1's sentence. In finding A2 guilty the learned Judge expressed view that A2 "ought to be set as a pariah to demonstrate to others what happens to nurses who, for monetary gain…renege on the solemn oath they took when entering the profession…" These are strong words but in the context of the verdict of guilty were completely appropriate. The moral blameworthiness of a nurse who commits unlawful abortions for money could not have been better expressed. As against that I am of the respectful opinion that the learned Judge should have found a lesser degree of moral turpitude in the conduct of A1. She was, after all, a distraught mother who saw her family disintegrating as a result of her child's pregnancy. She was well aware that she was committing a crime, and a very serious one at that, but her anguish, illustrated by the evidence of her weeping on many occasions, obviously made it impossible for her to resist what she considered the easy way out. In taking that route she failed to have regard to the pleadings of her daughter who, as was pointed by Masuku J, may well be psychologically scarred for life. She earned a salutary sentence. In my opinion, however, if 5 (five) years' imprisonment was considered by the learned Judge as a condign sentence for A2, which is no doubt so if she were guilty, then some period less than 5 (five) years' imprisonment is appropriate for A1. In my judgment the appropriate sentence for A1 is 3 (three) years' imprisonment.

In the result the conviction of first appellant is confirmed and the sentence is adhered to read 3 (three) years' imprisonment. Second appellant's appeal succeeds and the conviction and sentence are set aside.

_____

J. BROWDE
Judge of Appeal

P.H. TEBBUTT : I AGREE

P.H. TEBBUTT
Judge of Appeal

C.E.L. BECK : I AGREE

C.E.L. BECK
Judge of Appeal

Delivered on this November 2001.