IN THE HIGH COURT OF SWAZILAND

CRIM. CASE NO. S.221/84

In the matter of:

REGINA

vs

ERNEST M. MOFOKENG

CORAM: WILL, C.J.

FOR THE CROWN: A. DONKOH

FOR DEFENCE: W.M. PUPUMA

JUDGEMENT

(Delivered on 19/12/84)

Will, C.J.

The Accused is charged with murder alternatively with procuring abortion.

The Deceased died from overwhelming sepsis. The Crown established that an instrument was used which perforated the uterus. This set up a massive infection which caused death. I do not think it is necessary to consider in any detail the evidence on which I make this finding. The doctors who treated the Deceased were satisfied that there had been a perforation of the uterus and I shall deal with only one aspect of the evidence which, by itself, established that there had been a perforation by some instrument. In the circumstances of this case the possibility of perforation of the uterus from causes other than the insertion into the uterus of some instrument such as a curette, was remote. Dr Nxumalo who performed the first operation upon the Deceased found that foul-smelling pus which had been discharged from the uterus into the lower areas of the stomach could not have reached that area through the cervix and must therefore have escaped through some perforation.

There was other evidence resulting from his observations during the operation, which confirmed his view that there had been a perforation.

Dr Hickle considered that the Deceased could not have performed the abortion upon herself by using an instrument because, without some assistance, she could not have found her cervix and the pain of procuring an abortion upon herself would have been unbearable. Dr Nxumalo was not prepared to go quite as far in his evidence as Dr Hickle. In his opinion it was possible, but highly unlikely for the reasons given by Dr Hickle, for the Deceased herself to have procured her abortion by the use of some instrument.

The question for decision in this case therefore is whether it has been proved beyond reasonable doubt that it was the Accused who was responsible for causing the perforation in the course of procuring an abortion.

The only evidence connecting the Accused with the abortion was the dying declaration of the Deceased. In this declaration she stated that another girl at the school she attended gave her the Accused's name as a person who might be prepared to procure an abortion upon her. She went to the Accused's house, the

garage of which was used as the Accused's consulting room. The Accused agreed to procure an abortion for a fee of E80. He gave her an injection and she lost consciousness. On recovery she was bleeding profusely from her private parts and she was given pads with which to staunch the bleeding. Later she became ill and had to be removed to hospital.

The evidence of the Accused was that since 1975 he had been in private practice. It was necessary to carry on his practice from the garage of his house because he had not, since 1975. been able to find suitable rooms for his practice. He fitted the garage with furniture and shelves. Although he had what he referred

to as a "good" practice, he rarely employed a nurse or receptionist because they were not readily available. He therefore conducted his practice entirely on his own. In the course of his practice he carried out dilation and curettage procedures for patients who came to him after miscarriages or incomplete or inevitable abortions and heavy bleeding.

The police gave him the name of the Deceased but he was unable to recall that a girl of that name had ever been treated by him. If she had been treated by him she could have given him some other name. He denied procuring any abortion.

The Crown's difficulty in the case is that there is only the Deceased's dying declaration to connect the Accused with the abortion. Against her statement is the Accused's denial on oath. A dying declaration is of course only admitted if, as in this case, it was made in circumstances of solemnity "in the presence of death". The reason for acceptance of a dying declaration as an exception to the hearsay rule is that a person who knows he is about to die will not make a false statement, especially if such statement could be used in cinvicting an innocent person of a serious charge.

Counsel for the Crown conceded, and in my opinion rightly conceded, that the Deceased was an accomplice in the abortion which she stated was procured upon her. Because of this it was incumbent upon the court to observe the cautionary rules which apply in considering the evidence of accomplices. The court must therefore look for evidence which is corroborative of the Deceased's dying declaration and the corroborative evidence must be such as to incriminate the Accused. It is not sufficient if the corroborative evidence is of a neutral nature.

Counsel for the Crown pointed to three pieces of evidence

which, he contended, were corroborative of the Deceased's evidence. They were that it was clearly established by the medical evidence that an abortion was procured and that the Deceased stated that she was treated in the Accused's garage. The fact that an abortion was procured is corroboration of a neutral nature only and the fact that the Accused conducted his practice from a garage is only marginally of an incriminating nature. It may have become notorious that the Accused, for a period of some years, had conducted his practice from a garage.

The third aspect of the evidence relied upon by the Crown as furnishing corroboration was the circumstances in which Accused carried on his practice. Criminal abortion, he argued, is usually carried on in a "back-yard" type of situation. The Accused's practice was conducted from a garage and there was no nurse or receptionist. I doubt whether this fact amounts to corroboration at all.

On this ground alone, the prosecution must fail. But there is another ground on which it must fail.

On the one hand there is the statement of the Deceased, given it is true, in circumstances of solemnity and in the presence of death but she could not be cross-examined upon it and, as already stated, was insufficiently corroborated. On the other hand there is the evidence of the Accused given upon oath and

subjected to cross-examination. There are insufficient grounds on which I could reject the evidence of the Accused. No damage was done to him in cross-examination. I am, of course, conscious of the fact that there was very little material for cross-examination, but that fact can not be held against the Accused. His

evidence was criticised by Counsel for the Crown on the ground that the Accused, having been given the name of a person which he did not recognise, did not call upon the police to confront him with the girl herself. This submission appears to be somewhat unrealistic in the circumstances of the case because the Accused was by then already under detention by the police. There was also criticism of the nature in which Accused carried on his practice. However justified may such criticism be, it seems to me to have little bearing on the question of credibility. If, therefore, there are insufficient grounds for me to reject the evidence of the Accused it becomes his word on oath against the Deceased's dying declaration.

I find the Accused not guilty and I discharge him.

D.D. Will

CHIEF JUSTICE