CASE NO.184/98

In the matter between:

REX
/

VS

ELIZABETH MATIMBA
JOYCE NTOMBIFUTHI MDLULI

CORAM	**:**	**MASUKU J.**
For the Crown	**:**	**MRS M. DLAMINI**
For the Accused	**:**	**MR K.N.M. VILAKATI**

RULING ON APPLICATION AT CLOSE OF CROWN'S CASE
22/5/00

The above accused persons are charged with abortion. The indictment alleges that either one or both of them and acting in common purpose did wrongfully and unlawfully administer a certain drug to Fikile Matimba, a female residing at Malindza, at or near Mbabane Government Hospital Nurses Home, Hhohho region, the said Fikile Matimba then pregnant with a living foetus, with intent thereby to procure the miscarriage of the said Fikile Matimba and as a result of the administration of the said drug cause the death of the said foetus and its expulsion from the body of the said Fikile Matimba.

The Crown led the evidence of ten witnesses to prove its case. At the close of the Crown's case, Mr Vilakati, guided by a decision of this Court, in **REX v JUSTICE TEYA MAVIMBELA CRIM.CASE NO. 115/98** (unreported by Masuku J.) which relates in part to the duties of the defence Counsel at this stage of the proceedings, conceded that the Crown had succeeded in establishing a *prima facie* case against Accused 1, thereby requiring him to call Accused 1 to her defence. With regard to Accused 2, Mr Vilakati was of the view that the Crown had failed in establishing a *prima facie* case against her.

In support of this application, Mr Vilakati raised the following arguments. First that the Crown had failed to prove common purpose between the accused persons. Second, that the

evidence against her was given by Fikile Matimba (PW 7) to members of the Community Police in her absence. He argued that such evidence was inconclusive of whether it was the said Accused person who was referred to by PW 7 as Sister Mdluli.

Third, that the Crown impeached its own witness, PW 7 and therefor the evidence given by PW 7 against Accused 2 is not credible and may not be properly relied on by this Court. Mr Vilakati further reasoned that the evidence by PW 6, 2337 Sergeant Vusi Dlamini did not take the matter further because it was his evidence that he interrogated the Accused 1 and PW 7 and as a result of the interrogation, he went to the Nurses home, where he was told that she was at work at the Government Hospital to where he went and found A2 in the office. He took Accused 2 to the Police Station for questioning and later released her. It is not clear to the Court, Mr Vilakati argued, what Accused 1 and PW 7 said to the Police Officer as this was not disclosed to the Court. Mrs Dlamini for the Crown strenuously opposed this application.

Before considering the success or otherwise of this application, I find it apposite to briefly outline the relevant portions of the evidence led. PW 1 was Thamsanqa Gwebu PW 7's boyfriend, who testified that PW 7 told him that she was pregnant and further handed in letters written to him by PW 7 in which she was expressing her helplessness and frustration at the fact that her mother, Accused 1, was coercing her to commit an abortion. I shall return to these letters later.

PW 2 was Robert Zwane, the leader of the Malindza Community Police. His evidence was that sometime in May, 1998, PW 1's father complained regarding a misunderstanding between his family and Accused 1's family. As a result, a meeting involving both families and the Community Police was convened at the Gwebu homestead. The bone of contention appeared to centre around PW 1 impregnating PW 7, which the latter's family, particularly Accused 1 strongly objected to. It was established during that meeting that PW 7's pregnancy had disappeared. PW 7 was called amongst other people to explain.

PW 7 told the members of the Community Police that she never intended to have her pregnancy terminated but her mother told her that her future had been ruined by the pregnancy and asked her to agree to submit to an abortion. Accused 1 further told her that she would take PW 7 to a Mdluli nurse in Mbabane who would procure the abortion. PW 7 further told the gathering that she was first introduced to the nurse and later went alone to the nurse who administered an injection which later led to the expulsion of the foetus, which foetus PW 7 took back home to her mother.

There is also the evidence of PW 6, the officer who arrested Accused 2. According to his evidence, he received a docket from 677 Inspector Simon Simelane (PW 5), together with two suspects i.e. Accused 1 and PW 7. After cautioning the two in terms of the Judges' Rules, it was his evidence that he made further investigations which led him to the Mbabane Government Hospital where he introduced himself to Accused 2, cautioned her in terms of the Judges' Rules, arrested her and took her to the Police Station where he charged her with committing an abortion.

Fikile Matimba (PW 7), who made a statement to the Royal Swaziland Police (RSP), was subsequently declared a hostile witness having confirmed that she recorded the statement in question. In that statement, which she read out in Court, she gave details of how the abortion was procured by Accused 2 at the Nurses Home in the Government Hospital. It

somewhat confirms the evidence given by PW 2 regarding what PW 7 told the gathering at the Gwebu homestead. PW 7 however denied knowing Accused 2 when cross examined by the Crown after having been declared a hostile witness. Earlier on, before being so declared, she confirmed having written the letters to PW 1.

Having outlined the highlights of the evidence against Accused 2, I find it apposite to consider the legal propositions applicable at this stage.

Section 174 (4) of the Criminal Procedure and Evidence Act 67/1938 (as amended) and under which this application has been moved, provides as follows:-

"*If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged or any other offence of which he might be convicted thereon, it may acquit and discharge him.*"

In the celebrated case of **THE KING v DUNCAN MAGAGULA AND 10 OTHERS CRIM. CASE NO.43/96** (unreported judgement by Dunn J. (as he then was), the test to be applied by the Court in considering the application under the said Section was stated with absolute clarity in the following terms at page 8:-

> "*This section is similar in effect to section 174 of the South African Criminal Procedure, Act 51 of 1977. The test to be applied has been stated as being whether, there is evidence on which a reasonable man acting carefully might convict* ***(R v SIKUMBA 1955 (3) SA 125; R v AUGUSTUS 1958 (1) SA 75,*** *not should convict* ***(GASCOYNE v PAUL and HUNTER 1917 TPD 170; R v SHEIN 1925 AD 6).***"

From the test so lucidly set out, it is clear that the Legislative nomenclature grants the trial Court discretion to decide, on the attendant facts of any matter, whether or not to grant the discharge. Like discretion in other cases, this must be judiciously exercised.

A St Q Skeen, in an article entitled "The Decision to Discharge An Accused at The Conclusion of the State Case: A Critical Analysis, South African Law Journal Page 286 at 287, considered the implications of the above Section as follows:-

> "*The words ' no evidence' have been interpreted by the Courts to mean no evidence upon which a reasonable man might convict. The issue is whether a reasonable man might convict in the absence of contrary evidence from the defence and not what <u>ought</u> a reasonable man to do. If a <u>prima</u> <u>facie</u> case is established the accused runs the risk of being convicted if he offers no evidence, but it does not necessarily mean that if he fails to offer evidence the <u>prima facie</u> case will then become a case proved beyond a reasonable doubt. This may or may not take place. It sometimes happens that a court, after*

> *refusing an application for discharge at the conclusion of the State case, will acquit the accused where he closes his case without leading any evidence. In other words, what a reasonable man might do does not equate with what a reasonable man ought to do. The test at the conclusion of the whole case is whether the state has proved the guilt of the accused beyond a reasonable doubt. The issue as to whether there is evidence on which a reasonable man may convict is a matter solely within the opinion of the judicial officer and may not be questioned on appeal."*

I whole heartedly embrace these remarks. What I must now consider, acting carefully, is whether it can be said that there is no evidence in this case that the accused committed the offence charged or any other offence of which she might be convicted. In answering this question, I propose to address the arguments raised by Mr Vilakati in support of the application.

The first argument was that the Crown failed to prove common purpose in this matter. The basis for this contention was unfortunately not pursued. In his last judgement, in the case of ***REX* vs JUSTICE MAGAGULA AND 6 OTHERS CRIM. CASE NO. 75/98,** at page 16, Dunn J. cited remarks of Tindall J.A. in **REX vs DUMA AND ANOTHER 1945 AD 410 at 415**, where Justice Tindall propounded the law relating to common purpose as follows:-

> "*The liability of persons who assist in the carrying out of a common criminal purpose was considered in the case of* ***REX vs GUNSWORTHY AND OTHERS.***
>
> > *In my opinion the principles applicable were formulated with substantial accuracy by Dove Wilson J.P. in the following terms:-*
> >
> > *Where two or more persons combined in an undertaking for an illegal purpose each one of them is liable for anything done by the other or the others of the combination in the furtherance of their object." If what was done was what they knew, or ought to have known would be the probable result of their endeavouring to achieve their object. If on the other hand what is done is something which cannot be regarded as naturally and reasonably incidental to the attainment of the object of the legal combination then the law does not regard those who are not themselves personally responsible for the act as being liable. But if what is done is what anybody engaging in this illegal combination would naturally or ought naturally to know would the obvious and probable result of what they were doing then all are responsible."*

In terms of this dictum, I am of the view that common purpose was proved from the evidence led and this will become apparent as consideration of the evidence led unfolds regarding the other arguments. In particular, a clear inference is to be drawn that Accused 1, burning with vaulting ambition to terminate PW 7's pregnancy, went to Mbabane Government Hospital where she engaged Accused 2's services. Accused 2 there administered drugs to PW 7, which eventually led to the expulsion of the foetus from PW 7's uterus.

In my view, it cannot be said that no evidence was led against Accused 2 and on which a reasonable man might convict. Firstly, there is the evidence of PW 2 Robert Zwane, the important aspects of which were highlighted above. PW 2 stated that PW 7 identified the Nurse as Sister Mdluli of the Mbabane Government Hospital. This was not challenged by the defence. To substantiate this point, I find it apposite to make excerpts from PW 2's cross-examination by Mr Vilakati as recorded in my notes:-

Q: The rest of the information for example about the nurse, you obtained from Fikile

A: Yes.

Q: This includes the name of the alleged nurse

A: Yes and Accused 1 confirmed it.

This evidence, which linked Accused 2 to the commission of the offence was not challenged by the defence in at least three respects. Firstly, it was never denied that the meeting in question was held. Secondly, the identity of the nurse mentioned by PW 2 as disclosed by PW 7 was not denied, neither was the place of the said nurse's residence and work denied. Thirdly, it was never put to PW 2 that Accused 1 never denied confirming the identity of the nurse.

Secondly, in the letter written by PW 7 to PW 1 particularly, Exhibit "B", dated 11th May, 1998, PW 7 informs PW 1 that Accused 1 wants the pregnancy to be terminated. She further informs him that Accused 1 gave her some medicine to drink which she (PW 7) is refusing to take. She further records that Accused 1 was telling her that she (Accused 1) was looking for a Doctor. Lastly, she states in that letter if she continues to stay at her home, Accused 1 will end up prevailing in her intentions and states that as she is writing the letter, Accused 1 is in Mbabane and she (PW 7) does not know what Accused 1 has gone there to do.

In Exhibit 'C', dated 17th May, 1998, PW 7 informs PW 1 *inter alia*; that on that morning, Accused 1 was forcing her to go to Mbabane again. She mentions further that on the Wednesday, she (PW 7) had refused to succumb, clearly to an abortion. It is apparent that PW 7 went to Mbabane concerning terminating the pregnancy on at least two occasions. This is confirmed by her statement recorded before the Police in Manzini. In that statement, PW 7 described the intricate details of when, where, how and by whom the pregnancy was terminated and further states at whose behest it was carried out. She mentions Accused No.2 and her place of work and residence by name in that statement.

Whilst it may be true that she was declared a hostile witness, it is not true that her evidence must be expunged from the record.

In the case of **DUNCAN MAGAGULA AND 10 OTHERS** (supra), at page 6, Dunn J. dealt with the approach to be adopted by the Courts in Swaziland where a witness has made an earlier inconsistent statement, which is governed by the provisions of Section 273 of the Act. He cited with approval the summation by Isaacs J.A. in **MBULAWA JOHN DLAMINI** and **ANOTHER vs R 1982 – 86 SLR 133**, which is as follows:-

> *"(3) If the witness, (i.e. one declared hostile) however, now adopts what he had said in his prior statement and repeats it in court, that new evidence is admissible, but the witness will now have contradicted himself, and the weight to be attached either of his two versions is a matter for the court to decide. In general, the evidence of such a witness will be rejected, but this is not an absolute rule."* *(my own emphasis).*

In *casu*, PW 7 recorded a statement with the Police, which is confirmed in material respects by the evidence given by PW 2, which he states is what PW 7 told the gathering at the Gwebu homestead. In both, she implicates both accused persons. When she gave her evidence, having been declared hostile, she made a statement under oath, which sought to exculpate both accused persons and to render the expulsion of the foetus one occasioned by natural but unfortunate phenomena. It is now my duty to decide, whether to reject her evidence *in toto* or choose which version to believe. In the latter case, I also have to decide what weight ought to be attached thereto. In this case, I have no hesitation in accepting the contents of the statement made to the Police as true. This is because it tends to confirm what she told the meeting as recounted by Zwane and is further confirmed in relation to Accused 1 going to Mbabane which is a cause for concern to PW 7 by Exhibit "B". Exhibit "C" confirms that PW 7 went to Mbabane twice for purposes of procuring the abortion, which is also recorded in the statement. Furthermore, the PW 7's demeanor, when cross examined by the Crown was indescribably declaring one story, that PW 7's version in Court, insofar as it detracted from the clear and unambiguous contents of Exhibits "B" and "C" and the statement, all written under her hand was nothing but an unmitigated lie. I will deal with this in greater detail in the main judgement.

Thirdly, there is the evidence of PW 6, who stated that he was handed Accused 1 and PW 7 and the docket by PW 5, who also confirmed these facts. He stated that having interrogated the two suspects, he got information which led him to a particular house at the Nurses Home in the Government Hospital Compound where he had gone to look for a Sister Mdluli. At that house, he was told that the Sister Mdluli is at work in the hospital. This is where and how he arrested Accused 2. PW 6 was not cross examined by the defence. It was not suggested to him for instance that there was another Sister Mdluli in the hospital or that Accused 2 denied having been involved at all in the commission of the crime to PW 6.

It cannot be said there is no evidence linking Accused 2 to the offence merely because PW 6 did not disclose to the Court what he was told by Accused 1 and PW 7 as contents of that information are clearly inadmissible hearsay evidence. It is however clear that PW 6 obtained information which led him to reasonably suspect that Accused 2 was involved in the

offence, hence her arrest. The fact that Accused 2 was not at Malindza to deny the allegation made against her by PW 7 and Accused 2 as recorded by PW 2 is not any or sound basis that there is no evidence linking her to the offence.

Lastly, and by way of observation, the Court being mindful that there is no onus on an accused person to prove his or her own innocence, no defence has been put to the Crown witnesses which would exculpate Accused 2 because the evidence given by PW 7 when questioned by Mr Vilakati was proved to be palpably false. PW 7's story, which is false as shown by other evidence that I need not traverse here, is that she felt pain in her uterus and when she went to urinate, blood came out together with the foetus. She then called Accused 1 to attend her. Accused 1 came with one Gogo Sukati and they washed PW 7 and took the foetus and disposed of it in her absence. Gogo Sukati subsequently gave evidence and featured as PW 10. She denied having been party to what PW 7 alleged. She said that event never happened. Under cross-examination, it was never suggested to her that her denial above recorded was false.

Had PW 7's evidence in this regard been true, it would have meant that the abortion occurred at Malindza. This would have led to the conclusion that the Crown had failed to link Accused 2 to the offence as it would mean that no abortion was carried out in Mbabane as alleged in the charge sheet and PW 2's (Zwane) evidence would have been rendered a fiction of a fertile imagination, if not downright falsity.

In the circumstances, I am of the view that this application ought to fail. From the foregoing, it cannot be said that no evidence has been led by the Crown on which a reasonable man might convict. Accused 2, like Accused 1 must be called to her defence and it is so ordered.

T.S. MASUKU

JUDGE

CRIM.CASE NO.184/98

In the matter between:

REX

VS

ELIZABETH MATIMBA
JOYCE NTOMBIFUTHI MDLULI

CORAM	**:**	**MASUKU J.**
For the Crown	**:**	**MRS M. DLAMINI**
For the Accused	**:**	**MR K.N.M. VILAKATI**

JUDGEMENT

22/8/01

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i) **The Charge**

The accused persons stand before me charged with the crime of abortion. The indictment alleges that on or about 13th May 1998, at or near the Mbabane Government Hospital Nurses' Home, the said accused persons, either one or both of them, acting in common purpose did wrongfully and unlawfully administer a certain drug to Fikile Matimba, a female there residing, who was then pregnant with a living foetus, with intent thereby to procure the miscarriage of the said Fikile Matimba, and did, as a result of the administration of the said drug cause the death of the said foetus and its expulsion from the body of the said Fikile Matimba.

Accused 1 (A1) is the natural mother of the said Fikile Matimba (PW 7), whose home is at Malindza area, in the Lubombo District. Accused 2 (A2) is a nurse in the employ of the Swaziland Government, stationed at the Mbabane Government Hospital. She resided at the Nurses Home within the Mbabane Hospital compound.

In support of the indictment, the Crown led the evidence of thirteen (13) witnesses. I propose to chronicle the important aspects of this evidence. I will thereafter analyse the Crown's evidence and assess the credibility of the Crown witnesses. I will proceed to recount the salient features of the evidence of the defence, together with an assessment of the accused persons' evidence. This will naturally lead to a conclusion as to whether or not the Crown succeeded in proving common purpose and the guilt of the accused persons beyond a reasonable doubt.

ii) **The Chronicle of the Crown's Evidence.**

PW 1 was Thamsanqa Emmanuel Nkosinathi Gwebu, also a resident of Malindza area. He testified that PW 7 was his girlfriend and that as a result of their relationship, PW 7 fell pregnant. It was his evidence that on the 20th January 1998, PW 7 told him of her suspicions that she was pregnant. PW 7's parents asked him about the pregnancy but he denied any knowledge of this.

Later, A1 came to the Gwebu homestead and found PW 1's relatives. She told them that she had come to ask the Gwebus to dig her grave because PW 1 had caused her to be separated from her homestead. She recounted that her husband is short-tempered and will not accept what PW 1 had done to his daughter. Although she did not state clearly, it became apparent to PW 1's family that she was referring to PW 7's pregnancy.

He further testified that on a day he did not recall, A1's husband also paid them an unpleasant visit. He had a hand in his pocket. PW 1 ran away and watched Mr Matimba's outbursts and antics. He loudly proclaimed at PW 1's yard that PW 1's relatives would be sorry for PW 1's transgressions. He walked away. Fearing for PW 1's safety, his aunt told him to go and live in Matsapha as his (PW 1's) parents were away. When PW 1's father returned and was informed of these events, he decided to ask Robert Zwane and his neighbours to hold a meeting for reconciling the two families.

The meeting was held at PW 1's home. He was called and asked about his relationship with PW 7 and he made a full disclosure. PW 7 was also called and she confirmed the relationship and the issue of the pregnancy. She told the meeting that she was no longer pregnant, which fact she disclosed by letter to PW 1. When asked what had happened to the pregnancy, she kept quiet and looked at A1. A1's husband then told A1 to tell the gathering what had happened, as it was clear that she knew.

PW 1 testified that A1 told the gathering that she took PW 7 to a nurse in Mbabane to clean her and when asked where the foetus was, she said it was at her homestead. The meeting proceeded to A1's home, where A1 pointed the spot where the foetus was. PW 2 said he was not willing to leave any evidence concealed and asked A1 to exhume the foetus which she did. The Royal Swaziland Police (RSP) were called. It was PW 1's evidence that a Simelane officer took the matter over, but PW 1 did not follow the matter up thereafter.

PW 1 also handed in to Court four letters which he received from PW 7 and these were marked Exhibits "B" to "E". Exhibit "B" is dated 11th May 1998 and in that letter, PW 7 informs PW 1 that A1 intends to have the foetus expelled. She stated that she did not know what to do as she had clearly exhibited her unwillingness to take certain medicines or concoctions A1 given her. She further stated that A1 is now looking for a doctor. PW 7 further stated that if she had an alternative place to stay, she would go to and stay there because if she continues staying at her home, her mother's will for the abortion to go through will prevail. Lastly she stated that as she was writing that letter, A1 was in Mbabane and she PW 7, did not know what A1's mission to Mbabane was about.

Exhibit "C" is dated 17th May 1998. In that letter, PW 7 states the following to her lover – that she is vexed by her mother's actions in that on that very day, A1 was again taking her

back to Mbabane although when A1 took her there on the Wednesday, she PW 7 had refused. She further stated that she was aggrieved about her mother's action because she (PW 7) had demonstrated to A1 that she did not wish to succumb, but A1 was coercing her. She further declared that she now regards whatever will happen to her as God's will for her life. Lastly, she stated that she was leaving everything in God's hands, as she had failed to fight the battle on her own.

Exhibit "D", which is undated, contains the following: - she expresses deep regret at what had taken place, i.e. the abortion. She asked PW 1 to forgive her as what had happened was not intended by her. Furthermore, she stated that as a result of her parents' action, she was even unable to eat her food. She further stated that even if PW7 managed to forgive her she would be unable to face him because in his eyes, she is a murderer. She profusely asked for forgiveness and asked for PW 1 to respond to her plea, also stating that even if PW 1 no longer loved her, he should reply to the letter. Lastly, she stated that she could be coming to apologise in person to PW 1, but she did not know how PW 1 could face a murderer.

Exhibit "E", which is also undated is a plea by PW 7, asking PW 1 that they should both leave their homes because the life at her home was unbearable, particularly as her father was ill-treating her. She requested PW 1 to give his reply to Thulile as she was under strict instructions from her parents not to speak to any of PW 1's relatives. PW7 concluded by stating that if they failed to elope on that day, she would commit suicide as she had no other avenue open to her.

In cross-examination, it was put to PW 1 that besides the letters to him by PW 7, he did not know what happened to the pregnancy and PW 1 stated that he knew because he saw the foetus but did not witness anyone carrying out an abortion on PW 7. It was put to PW 1 that there were many vigilantes during the meeting and that PW 2 threatened PW 7 that if she did not state her answer clearly, he would do something to her. PW 1 stated that there were about ten vigilantes, who were not carrying batons and knobsticks as alleged. He stated that PW 7 was not threatened but spoke frankly as the letters stated. PW 1 stated that he never heard any threat issued to A1 that she would tell the truth under unpleasant circumstances as suggested to him.

It was put to PW 1 that when PW 7 was to make a statement to the Manzini R.S.P., PW 2 said PW 7 should be removed as her parents would influence her. This PW 1 denied, saying that it was a member of the R.S.P. who suggested this, not PW 2. PW 1 further stated that he never saw A2 but stated that A1 did mention a nurse at Malindza, and even mentioned the nurse's name.

In re-examination, PW 1 stated that PW 2 never suggested any answers to the people at the meeting and also at the Police Station. When asked about the name of the nurse mentioned at the meeting, PW 1 mentioned A2's name.

PW 2 was Robert Zwane of Malindza, who stated that PW 1's father requested him to reconcile his family and A1's. It was his evidence that he convened the meeting at PW 1's home and it was attended by members of both families. He testified that PW 7's father stated that Gwebu's dog had committed adultery at his home. PW 1 was then asked to explain as he appeared to be at the heart of the controversy between the families. PW 2 confirmed PW 1's evidence, as previously recorded. He also confirmed that PW 7 was also called to state her side of the story.

PW 2 stated that PW 7 stated that the foetus was about 5 months old at the time of expulsion. PW 7 told the gathering that she informed PW 1 of the pregnancy and of the abortion. She further stated that she did not intend to have an abortion but her mother told her that her life had been ruined. A1 told PW 7 that she would take PW 7 to a nurse in Mbabane, who would demand E300.00, which was borrowed from another lady.

PW2 stated further that PW 7 told them that A1 took her to Mbabane and was introduced to A2 by A1. She later went to see A2 alone. On this occasion, an injection was administered to her and certain instruments were inserted into her genitalia and which she slept with. In the morning, the foetus was expelled and A2 wanted to incinerate the foetus but PW 7 pleaded with A2 not to. PW 7 said she wanted to take the foetus to A1, who had forced her to commit the abortion. A 2 gave her the foetus and she put it, into a bag and returned home with it. She gave it to A 1. PW 2 stated that he counselled the families to accept the death and consider each other as relatives. At some point they prayed. PW 2 confirmed that he asked A1 to point out the spot where the foetus was and she did so. She was asked to dig it out but she was reluctant at first. She than took a shovel and dug it out. The abdomen area of the foetus had putrefied but the upper body was fine. According to PW 2, the head looked like PW 1's.

The matter was then reported to the Manzini Police and Accused 1 never objected. The Manzini Station Commander received them and contacted Siteki Police and suggested a rendezvous. PW 3 asked A1 if she had been compelled to admit or whether force was brought to bear on her but she denied this, as she was penitent and was co-operative. The Police went to A 1's home and saw the place where the foetus was exhumed.

PW 2 also stated that the nurse's name mentioned in the meeting as aforesaid which was held around 30th May, 1998, was Mdluli. PW 2 denied that any of the people carried weapons during the meeting.

PW 2 was cross-examined closely by the defence attorney regarding the events of the meeting. He was asked whether the vigilantes caution suspects and he answered in the affirmative, but hastened to add that they do not reduce the cautions to writing. It was suggested to PW 2 that he threatened the people he interrogated and confronted them with information which PW 2 said was true and that if they denied this, he would take them to a place where they would admit it. This PW 2 denied. He further denied that he threatened all the persons who made statements at the Manzini Police Station as was suggested to him by the defence.

PW 3 was 1503, Supt. Agrippah Khumalo. He stated that he received a report of an abortion which occurred at Malindza and he proceeded to the home of Zablon Gwebu. There he found a dead foetus and through investigations established that it had been expelled from PW 7's uterus. He enquired as to where the foetus was taken from and A1 led her to a place where the foetus had been dug out. He testified that he then handed the matter to the Lubombo Murder Squad. He further testified that the mood at the Gwebu homestead was quite sombre, as the people resembled people in mourning.

According to PW 3, A1 was shivering because she was not used to the R.S.P. He further testified that A1 did not appear induced and that he interrogated her and she led him to the scene of the burial of the foetus. PW 3 stated further that he did not promise A 1 anything

and that A1 was not at Manzini Police Station when the report was made.

In cross-examination, PW 3 was asked when the statements were recorded in Manzini and he testified that it was before they travelled to Malindza. When asked why he did not refer the matter to Mpaka Police Post, PW 3 stated that the matter was reported at his station and he had to record the statements and then transfer the docket to the relevant Police Station to action the matter further. The defence stated its instructions were that A 1 was caused to make statements after PW 2 threatened her, which PW 3 denied. It was also suggested to him that A1 and PW 7 were warned by PW 2 not to deviate from the explanation given earlier and in PW 3's presence. PW 3 said he did not remember that.

In re-examination, PW 3 stated that she asked A1 why she was shivering and she told him that she was afraid of the R.S.P., which he understood to mean that she was afraid because of what she had done. PW 3 also stated that he cautioned A1 in terms of the Judges' Rules before he interrogated her.

PW 4 was Dr Ayodeje Opawole, of Good Shepherd Hospital, Siteki. He testified that on the 31st May, 1998, PW 7 was brought by Siteki Police around 14h00. It was his evidence that he noted that her uterus was abnormally bulky, suggesting that something was or had been in the uterus. The cervix was open and damaged at the edges. A pregnancy test was negative. An ultra sound scan report showed that there was a complete abortion. PW 4 testified that even in the absence of the aforesaid report, he would have still concluded that an abortion had occurred because of the state of the uterus. The PW 4 could not tell how old the pregnancy was at its termination.

In cross-examination, PW 4 stated that he did not personally carry out the ultra sound scan but sent for it. When asked if it was possible that the abortion was not induced, PW 4 agreed but hastened to add that the cervix was damaged and that something must have happened therefor. He opined that if the cervix is forced open, it becomes damaged and that in this case, there was a high possibility that the cervix was forced open.

PW 5 was 677, Inspector Simon Simelane of Siteki Police Station. He testified that he received a radio message from PW 3, telling him to meet the latter at Highway at 20h30. PW 3, PW2 and others arrived and proceeded to Mpaka Police Post and he was informed of the case. They then proceeded to PW 1's home where a human foetus was shown to him and it was in the ancestral hut. It was his further evidence that he cautioned A1 in terms of the Judges' Rules and asked her to show him where the foetus was exhumed and she did.

PW 5 then took A1 and PW 7 to Siteki, together with the foetus, which was left at Good Shepherd Hospital. On the 2nd June 1998, the two persons were taken to the hospital and a doctor examined PW 7. PW 5 then took A1 and PW 7 to Mbabane, where according to his investigations, the crime had been committed. He handed the two-some to Desk Officer 2377 Sergeant Vusi Dlamini. He further told the Desk Officer to find a Mdluli nurse who was implicated. Nothing of interest turned on the cross-examination.

PW 6 was 2377 Sergeant Vusi Dlamini who testified that on the 2nd June 1998, whilst on duty, he received a docket from PW 5 together with two suspects in connection with the matter. These were A1 and PW 7. He proceeded to caution them in terms of the Judges'

Rules. On further investigations, carried out on 3rd June 1998, he arrested A2 at the Mbabane Government Hospital, where he introduced himself as a Police Officer. He took her to the Police Station and charged her with the crime she now faces. PW 6 was not cross-examined.

PW 7 was Fikile Matimba, who was introduced as an accomplice witness. She was duly cautioned as an accomplice witness according to law. She told the Court that she knew PW 1 who was her lover since 1993 and that she fell pregnant as a result of the relationship. She stated that in 1998 she had a miscarriage and this occurred in the following manner: that on a Saturday, she was at her home in Malindza during school holidays. There was a pain in her womb and she felt an urge to go and urinate at which point the urine was accompanied by a clot of blood. She later testified that she called her mother A1, who in turn called Gogo Sukati and these washed her, took the "clot" into something and they took it somewhere unknown to her.

PW 7 confirmed that she was the author of the letters handed in by PW 1 and she stated that she was writing these letters to PW 1 so that they could elope. She denied that she knew A2 at all. Later, PW 7 admitted knowing A2 stating that she knew her from the Magistrate Court. PW 7 admitted being taken to PW 4, who confirmed that she had committed an abortion.

PW 7 was declared a hostile witness. She read the statement she made to the Manzini Police on the 30th May 1998. She confirmed that she wrote the statement in her own handwriting, having been given the piece of paper by PW 2 at the Manzini Police station.

The statement states that on the 13th May 1998 A1 took PW 7 to A2 (who is referred to as Sister Mdluli) for a pregnancy test which was positive. A1 asked A2 if it was possible to expel the foetus and A2 said she could do it. A2 then administered an injection and also put in the drip with some medication to induce PW 7 to sleep as she had refused for the foetus to be expelled. She returned on the 17th May whereupon A2 administered another injection and put in another type of medication in the drip. The following day, certain instruments were inserted into her private parts together with a tube (which was put in twice). The last time, the tube was filled with blood. On the following day, the drip was again administered with some red medicine.

After that, there was pain in the womb and back and this occurred during the whole day. Then at 12:30a.m., she felt an urge to push, which she did and only water was emitted. After that, the foetus was expelled into a bucket provided for that purpose. PW 7 then woke up A2 and A2 took certain plastic items and used them to take the foetus and put PW 7 back onto the mattress on which she was sleeping.

A2 told her to continue pushing until a tube inserted into her private parts was expelled. A2 then prepared a sick sheet for her to produce at school. A2 told her to give the foetus to A1 who would have to bury it but not put into the pit latrine. Indeed PW 7 did as told. She arrived home at 18h00 and A1 did not bury the foetus until the following morning. Thereafter, she resumed her activities as a scholar until she was asked by PW 1's family regarding the disappearance of the pregnancy.

PW 7 told the Court that what was contained in the statement was told to her by PW 2. When asked if PW 2 told her to write about A2, she denied. When further asked if PW 7 was present when the foetus was buried she again answered in the negative. When asked how PW 2 could know all the intricate details of the saga, PW 7 said PW 2 and herself were helping each other. She said she had an input in writing the statement.

When cross-examined by the defence, PW 7 stated that the "miscarriage" occurred at Malindza. She explained again how the "miscarriage" occurred and stated that nothing had been done to her private parts prior to the expulsion of the foetus. It is at this stage that she said after this expulsion she called A1 who came with Gogo Sukati, took her to the house,and washed her. They then took the foetus and put it into something.

When asked why she wrote the letters to PW 1, she stated that she wanted to elope before A1 knew of the pregnancy. She proceeded to give an account of the meeting which took place at PW 1's home, where she alleged that she was threatened and that the members of the vigilantes were carrying knobsticks and a Tsabedze was carrying a knobstick. Regarding what happened, PW 7 confirmed the evidence of PW 1 and PW 2. She stated that a lady police officer was recording the statement from her and PW 2 came and said that was improper.

PW 2 then asked for an office where he and PW 7 wrote the statement. She further told the Court that what she wrote in the statement was false. When asked how she obtained the details recorded in the statement, PW 7 said PW 2 had supplied these to her. PW 7 said she did not know whether A2 was threatened.

In re-examination, PW 7 was taxed regarding the reasons for writing the exhibits handed in by PW 1. She was asked as to why she never told the meeting that she had had a miscarriage, PW 7 said that she was afraid.

The Court asked a few questions from PW 7 and she stated that at the time of the expulsion of the foetus, it was about three months old. She further confirmed that her parents formed part of the circle at the meeting and she also formed part of the circle. PW 1 was sitting in front of her.

PW 8 was Nomsa Mazibuko, also of Malindza area. She testified that she knew A1, who was her neighbour and that sometime in 1998, as she was crossing the road, she heard somebody calling out her name. When looking back, she saw A1, who was with a Fakudze girl. The Fakudze girl told PW 8 that A1 wanted to talk to her. She went to the two-some and when she enquired as to why they had called her, both of them cried. After regaining composure, A1 told PW 8 that PW 2's mother came and told her that PW 7 was pregnant. This caused A1 to cry, whereupon PW 1's mother asked why she was crying because PW 7 is old and should have graduated from High School a long time but for her dullness.

A1 told PW 8 that she had taken a serious decision concerning this matter because it annoyed her. She said that she wanted PW 7 to commit an abortion. PW 8 dissuaded A1, asking how she will explain the disappearance of the pregnancy to PW 1's mother. PW 8 further told A 1 that abortion was a crime whereupon A1 she said that she had decided to go ahead and had even told God that she would do it. PW 8 further told her that there were many scholar girls who had fallen pregnant but returned to school after delivery.

On another day, she met A1 who said she was to meet a Khanyisile, who would take PW 7 to people who would "help" her. Again, PW 8 dissuaded A1 from carrying out her intentions. On the same day, A1 came over to PW 8's home to inform her that when she got home, she found PW 7 crying but PW 7 could not divulge why. She then asked PW 8 to talk to PW7, perchance PW 7 would be frank with her. Indeed PW 8 went to A1's home and found PW 7 weeping hysterically and she calmed PW 7 down. PW 7 told her that she was crying because she did not want to go where A1 as telling her to go. PW 8 then went to speak to A1 about this and A1 became very angry and started shouting. PW 8 again dissuaded A1 from forcing PW 7 to commit the abortion.

In her fit of rage, A1 shouted saying that PW 7 will miss the bus because of her delay; that if she refuses to go, A1's marriage would be destroyed as she would leave the homestead and PW 7 would have to sort out her problems herself. She stated that she did not want her husband to find her at home as he would kill her. She threatened to beat PW 7 if she continued to delay. Thereafter PW 7 came out of the house and the bus PW 7 was to board passed by. She said the bus had now gone and that Vuyisile had duped her into believing she would take PW 7 to where she had to go. Because Vuyisile had not honoured her word, A1 said she would personally take PW 7. PW 8 then left the Matimba homestead.

In cross-examination, PW 8 told the Court that she was called for the meeting between the Gwebu's and the Matimbas and there told them what she told the Court. It was put to her that A1 had never told PW 8 of her intentions and PW 8 insisted that A1 did and maintained what she said in her evidence in chief. It was further put to her that A1 asked her to talk to PW 7 about whether she was pregnant or not but PW 8 stated that she was to ask PW 7 why she was crying. It was further put to PW 8 that A1 never said PW 7 would miss the bus and that when A1 asked her to talk to PW 7, the issue of abortion was never mentioned. PW 8 maintained her evidence in chief.

When asked by the Court, PW 8 stated that she did not get to know the destination of the bus that PW 7 was to board.

PW 9 was Hleziphi Mjaji Fakudze and to whom PW 8 made reference to in her testimony. PW 9 stated she was a co-hawker with A1 and that in 1998, she told her that something was troubling her spirit, namely that she wanted to cause PW 7 to commit an abortion. PW 9 dissuaded her and told her that she had also fallen pregnant and dropped out of school but A1 was adamant. Then PW 8 came and A1 told PW 9 to call her, whereupon A1 told PW 8 that she wanted to cause PW 7 to commit an abortion and PW 8 dissuaded her. It was her evidence that she did not hear the rest of the conversation as she started crying and A1 also cried.

In cross-examination, PW 9 was asked closely about the incident where PW 8 was called. It was put to her that the question of abortion was never mentioned during the conversation between A1, PW 9 and PW 8. PW 9 maintained that it was. She was also asked about the conciliation meeting between the families. When asked if any of the vigilantes were armed, PW 9 said they were carrying knobsticks and straight sticks but does not know if they were armed. She stated that the vigilantes asked her if she had given E300.00 to A1 to enable her cause an abortion on PW 7. PW 9 confirmed that she told that gathering exactly what she had told the Court.

It was suggested to PW 9 that the issue of abortion was mentioned by her because she was

told by the vigilantes and she agreed. In re-examination however, she stated that all that she told the Court was true but what the vigilantes wanted to know was whether she had given money for an abortion. PW 9 agreed that she gave E300.00 to A1 and it was to purchase stock, and that is what A1 told her the money was for.

PW 10 was Lomsa Assienah Sukati of Malindza area, affectionately known as Gogo Sukati. She confirmed knowing A1 and PW 7. She stated that in May 1998, she, A1 and other women had to go the Swaziland Royal Insurance Corporation Offices in Manzini but A1 did not go, although the most important document was in her possession. PW 10 went to see A1 and found her in a terrible state. After enquiring about the reason for her sad countenance, A1 stated crying. Having regained her composure, A1 told PW 10 that she will be killed by her husband because PW 7 had fallen pregnant and he would accuse her of being too liberal. PW 10 told her that it is very difficult to contain human beings as even in boarding schools, they still misbehave.

One day, her husband told her that the vigilantes were looking for her. Some vigilantes came asking for her and they took her to PW 1's homestead where there were many people. She was ordered to sit down. When her turn to speak came, she was asked what she knew concerning PW 7 and she told them that she only knew that PW 7 was pregnant and was informed of this fact by A1. When asked if she knew about PW 7's abortion, she denied any knowledge of this. She denied helping A1 and PW 7 with the handling of the foetus as alleged by the latter. She denied ever being called by A1 to attend to PW 7's miscarriage.

In cross-examination, she was asked if the vigilantes were armed and she replied in the negative. When asked if she was afraid at PW 1's home, PW 10 confirmed, adding that she was afraid because she was called to sit with the vigilantes but did not know the reason why she had been called. PW 10 confirmed that around that time, the vigilantes were brutal in dealing with suspects. In re-examination, PW 10 stated that she was never threatened by the vigilantes but that they spoke politely to her.

The defence moved an application in terms of Section 174 (4) of the Criminal Procedure and Evidence Act, 1938, ("the Act") for the acquittal of Accused 2. A ruling dismissing this application, was handed down on the 22nd May 2000. The Crown indicated, immediately after the ruling was delivered that it intended to apply for re-opening of the case as new evidence had just come to light. The application was to be moved on resumption of the trial, which was in January, 2001.

(iii) Application for Re-opening of the Crown's Case

Mrs Dlamini for the Crown applied for the re-opening of the Crown's case on the grounds that this evidence was not available to Crown previously and that it was in the interests of justice for the Court to allow the Crown to lead the evidence as it would help the Court in arriving at a just decision in the matter.

Mr Vilakati for the defence opposed the application on the following grounds:-

a) that there is no basis for such an application in the C.P&E.

b) the defence would be prejudiced in that it will not have access to the summary of these witnesses' evidence.

(c) that the defence was taken by surprise and that it was not immediately clear as to what aspects the witnesses will testify on; and

d) allowing the application would defeat the Court's ruling on the Section 174 (4) application in that the Court had declared that there was a case for the accused persons to answer.

In response, Mrs Dlamini undertook to let the defence have access to the summary of evidence. She stated that the Court, in exercise of the powers conferred upon it in terms of Section 199 of the C.P.E. could call these witnesses as its own. She further stated that these witnesses will give evidence concerning events which occurred after the close of the Crown's case, but which were crucial and relevant to the just decision of the case.

In order to ensure that unnecessary and irrelevant evidence is not led thus prolonging the already long trial, the Court asked Mrs Dlamini to briefly state what the witnesses would say and she did. I granted the application and indicated that the reasons therefor would follow. I ordered that the defence be given the summary of the witnesses' evidence and postponed the matter to allow the defence to read the summary of the evidence, take instructions and to prepare for continuation of the trial. The reasons for that ruling now follow:

I agree with Mr Vilakati that re-opening of the Crown's case is not provided for in the C.P. & E, but that does not preclude the Court from exercising its discretion as will be seen herein below. The fact that the Court had refused the application for acquittal and discharge at the close of the Crown's case cannot be a ground for refusing the re-opening of the case because a *prima-facie* case is not the same thing as proof beyond a reasonable doubt at the end of the whole case.

In this regard, it is apposite to quote an excerpt from **A. St. Q. Skeen,** "The Decisions to Discharge an Accused at the Conclusion of the State Case: A Critical Analysis:, South African Law Journal, Vol…. Page 285 at 287. There the learned author reasoned as

follows:-

> "*If a **prima facie** case is established the accused runs the risk of being convicted if he offers no evidence, but it does not necessary mean that if he fails to offer evidence the **prima facie** case will then became a case proved beyond a reasonable doubt. This may or may not take place. It sometimes happens that a court, after refusing the application for discharge at the conclusion of the State case, will acquit the accused where he closes his case without leading any evidence."*

It therefor means that the Crown may not stop bringing crucial but hitherto unavailable evidence only because the Court refused an application at the close of the Crown's case.

Mr Vilakati further reasoned that the defence suffered prejudice because he was taken by surprise and would not know what the witnesses would say because their evidence was not included in the summary of evidence and he had not been furnished with a summary of the evidence that the additional witnesses would adduce. It is not true that the defence was taken by surprise. Mrs Dlamini informed the Court, in the presence of the defence counsel on the 22nd May 2000 that she would move such an application and the Court ruled that this application would be entertained at the resumption of the trial, which was on the 5th February 2001. It is unfortunate if the defence Counsel forgot this but it does not amount to the defence having been taken by surprise.

The prejudice that would otherwise result from the defence not knowing what evidence would be led by the additional witnesses was cured by ordering the Crown to immediately grant the defence access to the summary of that evidence. I further postponed the matter in order to allow the defence to scrutinise the new evidence, take instructions and to prepare to cross-examine the witnesses.

The role of the Judge in such matters is such that he exercises a discretion, which must be judiciously exercised. In **R v HEPWORTH 1928 A.D.265,** Curlewis J.A. had this to say regarding the Judges' position in criminal matters:

> "*A criminal trial is not a game… and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done."*

The general rule is that a party who has closed his case cannot afterwards claim the right to lead any further evidence. This is done in the interests of finality of litigation. See **SIMMONS N.O. v GILBERT HAMMER & CO Ltd 1963 (1) SA 897;** Hoffman and Zeffert, "The South African Criminal Law of Evidence, Fourth Edition, Butterworths, 1988, at page 475.

See **R v CASSAMO (1) 1979 – 81 SLR 328 at 329 D – F,** where Nathan C.J. stated thus:-

> *"There is no provision expressly authorising the High Court to re-open a trial in circumstances such as the present. The Court of Appeal has such powers under S.11 of the Court of Appeal Act 74 of 1954, and the High Court has similar powers in regard to matters emanating from the magistrate's court, under S5 (b) and (c) of the High Court Act, 20 of 1954. It also has power to do so in civil actions. See* ***Guggenheim v Rosenbaum (2) 1961 (4) SA 21 (W)….*** *It appears to me that the High Court should in the interests of justice assume similar powers by virtue of its inherent Jurisdiction in a criminal trial before it in which judgement has not been delivered although the cases for both the prosecution and defence have both been closed. Such power, however, should only be exercised subject to certain safeguards and requirements. These have been laid down in relation to the Court of Appeal in several cases. See* ***S v DeJager 1965 (2) SA 612 (A) at 613 C – D,*** *where they are stated as follows:- (sic)*
>
> a) *There should be some reasonably sufficient explanation based on allegations which may be true, why the evidence which it sought to lead was not led at the trial;*
>
> b) *there should be a* ***prima facie,*** *likelihood of the truth of the evidence;*
>
> c) *the evidence should be materially relevant to the out come of the trial."*

I am of the view that the three-pronged criteria set out by Nathan C.J. is fully met in this case. The circumstances under which a trial can be reopened have since been extended, as will be seen from an excerpt in Hoffman and Zeffert (op cit), at page 476 – 477, regarding the re-opening of a closed case. Because of appropriateness and relevance of this excerpt, I will quote in *extenso* there from:

> *"A trial court has a general discretion to allow a party who has closed his case to lead evidence at any time up to judgement. Naturally leave will be more readily granted after only one party has closed his case than after both have done so, and it will be still more difficult for a party to obtain leave after the weaknesses in his case have been exposed in argument or judgement has been reserved and the other witnesses have gone home. It is best to analyze the matter, as was done in* ***Du Plessis v Ackerman 1932 EDL 139,*** *according to the stage at which the application is made this will have an effect as has been said in a prominent text on civil*

procedure, of leading to the conclusion "that the court at each successive stage will be less ready to accede to an application for leave to re-open a case for the purpose of leading fresh evidence and will require a strong case to be made out before granting that privilege where argument has already been concluded." The aim of the court is to preserve a balance between abstract justice and the need for finality in litigation. But the trial judges' discretion should not be hampered by an inflexible rule; and despite what may have been said in earlier cases, an applicant's failure to show that he exercised due diligence is not decisive. And ***Hlanhla v President Insurance Co. Ltd 1965 (1) SA 614*** *is an example of a case where effect was given rather to the fact that the opposing party would not suffer prejudice by the re-opening that could not be dealt with by an award of costs. Factors which it will consider in the exercise of its discretion are the reasons why the evidence was not led before, the materiality of the evidence whether it is likely to have an effect on the result of the case – and the possible prejudice to the opposing party, who may no longer have available the witnesses who could have testified in rebuttal. In some earlier cases, leave was not generally granted unless the evidence could not by the exercise of due diligence have been led at the proper time. The following will have to be read in the light of a more liberal trend. If a party has evidence at his disposal but elects not to put it before the court because he does not consider it necessary, he will not be allowed to reinforce his case by leading it later…. But recent decisions have taken a more liberal attitude in situations where the opposing party is unlikely to suffer any prejudice which cannot be dealt with by an award of costs and this statement has been endorsed in* ***Barclays Western Bank Ltd v Gunas & Another 1981 (3) SA 91 (D) at 95 D.*** *Parties have been allowed, after closing their cases, to adduce evidence*

which has been omitted through inadvertence or because it was thought unnecessary on account of a ***bona fide*** *mistake of Law."*

Applying the foregoing excerpt in the instant matter, it is my view that the foregoing principles apply *mutatis mutandis* to criminal proceedings. It is clear that the application was moved after only the Crown had closed its case and it was well before argument or judgement. The defence had not called its witnesses and could, if it so desired, have called evidence to rebut this late evidence. Furthermore, there was no prejudice to the defence which could not be compensated with a postponement. Lastly, the reason for the evidence not being led earlier was not out of inadvertence nor was it thought to be unnecessary. I say this fully appreciative of the fact that even in those cases, the authorities say the application can still be granted. It is clear that the evidence eventually led was not available before then and could not have been anticipated even with the exercise of due diligence.

(iv) Chronicle of the Evidence of Additional Witnesses.

PW 11 was Lucy Masango, Accused 2's daughter. It was her evidence that she saw a female at A2's place of residence at the Nurses Home on two occasions. On the first occasion, PW 11 was from Manzini, put her books and went to school. On her return in the afternoon, the person had left. She pointed at PW 7 as the person she was referring to and she pointed at PW 7, who was sitting in the gallery.

In cross-examination, she confirmed that she saw PW 7 briefly on the first occasion and that there was nothing to make her take particular note of PW 7. She further stated that she saw PW 7 for the first time on a Tuesday, when they were opening school for the second term. She could not recall the date for the second occasion but it was about a week after the last time. She said she glanced at PW 7, this time. It was established that an identification parade was not conducted but she was asked by a Maphosa Policeman to see the Crown Counsel. Crown Counsel asked her if she knew PW 7 and she said she did not know the name but a lady came to her home and when she described the person, Crown Counsel said it was PW 7. It was put to her that the person she saw in 1998 was not PW 7 but she maintained that it was.

In cross-examination, she stated that she saw PW 7 in May, 1998. She gave the description of PW 7 as given to Crown Counsel. She stated that no one showed her PW 7 but she saw PW 7 of her own accord. When asked by the Court, PW 11 said she saw PW 7 for a very short time in the morning on first occasion but on second occasion, she was at home for the entire lunch hour and saw PW 7 during that time. It was her evidence that she recognised PW 7 on the second occasion because she had seen her before.

PW 12 Hazel Lomitsi Mashaba, A 2's daughter. She said a Mr Mngwambe came to the house after he visited A2. As a result of information he had from A2, they took certain items which were handed into Court from A2's house and took them to Sibongile Dube's house at Mngwambe's instance. It was her evidence that these items had been in A2's house for a very long time. These items consisted of a large assortment of medical gadgets, medicines and instruments. She described some instruments as like those that had been inserted into her genitalia during an operation. It was her further evidence that she visited A2 in custody where she is kept and A2 said she understood that the items referred to above had been found.

In cross-examination, it was put to PW 12 that the items were not at A2's home but PW 12 insisted that they were and had been there a very long time. She said she removed these in May 2000 after A2 was taken into custody. She said A2 spoke to her about the items after they had been found by the Police at Sibongile Dube's house. It was stated to her that A2 denied discussing the items with PW 12 but she maintained that this was discussed. It was suggested that PW 12 was in the Republic of South Africa when A2 was incarcerated but PW 12 denied this saying she was already in Swaziland. When told that A2 denied knowledge of the items, PW 12 stated that A2 cannot deny the items because she is a nurse and the items were found in her house. She also informed the Court that the items were in A2's wardrobe.

PW 13 was Sibongile Lydia Dube who confirmed that PW 12 came with a Mr Mngwambe who was carrying a bag. After having a meal with them, Mngwambe gave a bag to PW 12, who asked her to keep the bag for her and she agreed. It was normal for her to keep items

for PW 12 as they were co-hawkers. She testified that a week later, members of the R.S.P. with PW 12 came to her and she handed over the items. The contents of the bag were emptied by the Police and the items before Court came out. Nothing turned on the cross-examination.

Admissibility of Certain Crown Evidence

During his submissions at the conclusion of the trial, Mr Vilakati, for the first time challenged the admissibility of certain portions of the Crown evidence and this naturally took the Court and the Crown by surprise. I find it appropriate to deal with the portions of evidence complained of.

a) **Admissibility of Letters**

Mr Vilakati argued that the letters written to PW 1 by PW 7 are inadmissible to prove the truth of the contents and are only admissible to prove that they were made. The letters were written by PW 7 and she admitted as much in Court. She was called by the Crown as a witness. I am of the view that she lied in explaining certain portions of the letters but the fact that she was called as a witness renders the letters admissible, not only to prove that these letters were written but also the veracity of the contents.

In this regard, I am fortified by Hoffman and Zeffert (*op cit)* at page 623, where Phipson on Evidence is cited. It is stated thus

> *"Oral or written statements made by persons who are not parties and are not called as witnesses are inadmissible to prove the truth of the matters stated…"*

It is my finding that the letters are therefor admissible to prove the truth of the matters therein.

b) **Admissibility of Statements by PW 7 to PW 2**

I can find no basis for excluding these because they constituted evidence of things that were done on PW 7 by both accused persons. She gave this information to PW 2 without having been threatened and they are therefor admissible in my view.

© **Admissibility of Admission by A 1**

The admissions made by A1 to PW 2 and his vigilantes are inadmissible as evidence against A2. In this regard, the **R v BAARTMAN AND OTHERS 1960 (3) SA 535** is instructive.

(d) Admissibility of the Evidence of PW 6, regarding Arrest of A2.

Mr Vilakati argued that the evidence of PW 6 was inadmissible. PW 6 stated that from his interrogation, he obtained information that led him to arrest A2 without giving that information. Mr Vilakati contended that this evidence was inadmissible and referred the Court to **HOFFMAN AND ZEFFERT at page 628-629,** where the learned authors regard this evidence as disguised hearsay.

It is clear that the evidence of both PW 5 and PW 6 falls within the definition of disguised hearsay described by the learned authors above. I however find the accused's reaction significant in such cases. When confronted with allegations regarding the commission of an offence, accused persons normally tender an explanation or a denial. This was not the case with A2. PW 6 did not disclose any denial or even an explanation and none was put when he was cross-examined.

Was PW 7 an accomplice witness?

Mr Vilakati urged the Court to reject the evidence of PW 7 in its entirety because she was introduced as an accomplice witness and she proved to be one. Mr Vilakati argued further that PW 7 lied and that the Court should therefor have difficulty in accepting her version as correct.

Was PW 7 an accomplice witness *strictu sensu?*

Joubert J.A. in **S v WILLIAMS 1980 (1) SA 60 AT 63** (translation) described an accomplice in the following language, as distinguished from a perpetrator or co-perpetrator, namely: -

> *"On the other hand, an accomplice is not a perpetrator or co-perpetrator, since he lacks the **actus reus** of the perpetrator. An accomplice associates himself wittingly with the commission of the crime by the perpetrator or co-perpetrator in that he knowingly affords the perpetrator or co-perpetrator the opportunity,*

> *the means or the information which furthers the commission of the crime. According to general principles there must be a causal connection between the accomplice's assistance and the commission of the crime by the perpetrator or co-perpetrator…He is…liable as an accomplice to murder on the ground of his own act either a positive act or an omission, to further the commission of the murder and his own fault, **viz** the intent that the victim must be killed, coupled with the act (**actus reus**) of the perpetrator or co-perpetrator to kill the victim unlawfully."*

The evidence before Court is that PW 7 did not want to commit this abortion and this is manifest from the evidence of PW 1, PW 2, and PW 8 and of course the letters which PW 1 handed in and which PW 7 confirmed being the author of. In my view, PW 7 cannot be said to have had the *mens rea* for the death of the foetus nor has this been shown. She was a helpless girl who had her hands and feet placed in the vice-grip of a domineering mother, subjectively with little choice. In the language of **R v McCOY 1953 (2) SA 4 (SR)**, she submitted to the commission of this offence and did not actively or otherwise support it.

Furthermore, it cannot be said that PW 7 wittingly associated herself with the commission of the offence nor can it be shown in anyway that she knowingly afforded the accused persons the means or information which furthered the commission of the crime. Her only involvement was to succumb to the vaulting evil ambitions of a strong-willed mother after boundless amounts of persuasion and intimidation were brought to bear on her.

In view of the foregoing, I will treat the evidence of PW 7 as that of an ordinary witness as in hindsight, she should not have been introduced as an accomplice witness.

(e) **Assessment of Crown's witnesses.**

In my view, the Crown's evidence was largely reliable and in my view honest. All the Crown's witnesses, except PW 7 of course, and whose evidence I will analyse below, adduced their evidence in a matter-of-factly manner and they were not shaken in cross-examination. They impressed me as honest witnesses and I have no reason to fault them.

I however noted a discrepancy in dates between the evidence of PW 4 and PW 5, regarding the correct date on which PW 7 was examined by a Doctor. PW 4 stated that it was on the 31st May, 1998, which is supported by the medical report filed. PW 5, on the other hand testified that this was done on the 2nd of June, 1998.

In my view, PW 5 may have been mistaken regarding this date but the contradiction of the said witnesses is not very material and I cannot say that PW 5 was unreliable generally as a witness. It is not in dispute that PW 7 was seen by a Doctor. In this regard, I refer to H.C. Nicholas, "Credibility Witnesses", South African Law Journal, Vol.102, page 32 at 35:-

> *"The argument is often advanced in court that, because the witnesses' accounts disagree, they lack veracity, and considerable time is spent in establishing, and basing argument on contradictions and discrepancies. Such argument is fallacious. It is the case that where two or more witnesses give consistent evidence that may be a strong and indeed decisive indication that their story is a credible one…. But the converse is not true. It is not the case that lack of consistency between affords any basis for an adverse finding on their credibility. Where contradictory statements are made by different witnesses, obviously at least one of them is erroneous but one cannot say which one. If follows that an argument based only on a list of contradictions between witnesses leads nowhere as far as veracity is concerned."*

PW 7 however stands on a different footing. As will appear from the record, she was impeached by the Crown and was very hesitant and unconvincing, on issues that I will adumbrate below. Her sojourn in the witness box bore witness to the remarks by **Osborne**, in his work entitled, **"The Mind of the Juror 1937"** at page 86, where the following appears:-

> *"The witnesses speak…not by words alone….Their faces and their changing expressions may be pictures that prove the truth of the ancient Chinese saying that a picture is equal to a thousand words…"*

In my view, she lied in many respects and I propose to enumerate the following:-

- her explanation of how the miscarriage occurred. This was rendered palpably false by the evidence of PW 10, Gogo Sukati and that of PW 1 and PW 2, and PW 4.

- her explanation of the letters, especially that she wanted to elope was hopelessly and woefully unconvincing. She omitted to read certain damning words in the letters, particularly where she referred to herself as a murderer.

- her denial that she knew A2. She was hesitant when she gave her answer and this
  I recorded in my notes. In this regard, I refer to the answers she gave in relation

to her statement after being declared hostile by the Crown:-

Q: You said A1 took you to A2 on the 15th May 1998, which is the date the indictment alleges the abortion was committed.

A: No.

Q: When was the pregnancy aborted

A: On the 17th May 1998.

Q: It was after your trip to A2

A: According to the statement on 17/05/98 I was with A2 in Mbabane but I was at home.

Q: A2 used to reside in Mbabane as stated in the statement.

A: She still stays there even now.

Q: You know her

A: I see her when we come to Court

Q: Where about does she stay in Mbabane

A: I do not know.

Q: That implies you used to know where she used to reside

A: I would not know.

Q: You said even now she still resides there, which means you used to know. You recall that

A: Yes

Q: That means you agree that A2 used to reside in Mbabane even in 1998

A: I do not know where she stayed in 1998.

- her explanation that PW 2 forced her to write the statement and told her what to write is false and she failed to effectively conceal that she was lying by her reaction and facial expressions to which the Court was alive.

- when asked by the Crown as to the explanation as to why she referred to herself as a murderer in view of her story that the abortion was natural, she said she did not know how to answer.

- when asked why she did not tell the meeting of the 30th May 1998 that she had

had a miscarriage, she said she was afraid. This is also untrue because she looked at her mother. There was no need to be afraid if indeed she had had a miscarriage.

- on many occasions, she avoided answering the questions put to her directly and the Court was called upon time and again to direct her to answer the questions posed and most of which were straightforward.

The reason why she lied to the Court is not difficult to find. This is obviously the fact that she was trying to protect her mother in view of the serious offence that she stands accused of having committed.

The defence urged the Court to reject PW 7's evidence *in toto* as it was clear, as the defence itself noted, that she had lied. Is that the proper course?

This issue, relating to impeached witnesses, was dealt with by Beadle C.J. in **S v MILLAR 1972 (1) SA 427 @ 429 (c) (R.A.D.),** where the learned Chief Justice reasoned as follows:-

> *"It is a well accepted rule of evidence that the mere fact that a witness is a liar does not mean that all his evidence must be disbelieved-liars tell the truth sometimes.*
>
> *As far as this particular matter is concerned, not only , must each case be examined in relation to its own particular circumstances, but every individual item of evidence which the court is asked to accept or reject must be examined . The Court must consider on the probabilities whether each item of evidence is credible or whether it is not."*

His Lordship proceeded to refer to his earlier judgement in **R v TICHANETSANA AND OTHERS 1965 (4) SA 233 (S.R.A.D.).** He held that the approach to the question whether an impeached witness should be believed is the same as that applicable to accomplice witnesses.

In view of the above remarks, it would be improper to disregard PW 7's evidence in its entirety. In any event, it is important, as Beadle C.J. stated, that each case must be examined in relation to its own particular circumstances. The above view appears to correspond with the view taken by Isaacs J.A. in **MBULAWA JOHN DLAMINI AND ANOTHER v REX 1982 – 86 SLR 133,** referred to in the ruling on the Application in terms of the provisions of Section 174 (4) of the Criminal Procedure and Evidence Act.

The circumstances of this case are such that it is abundantly clear that PW 7 lied as I have indicated above. The evidence that she adduced in Court was largely falsehood concocted solely to protect the accused persons. There is now the version she gave to the Royal Swaziland Police and the evidence she adduced in Court. From the two versions before Court, I believe, the statement as being the most probable version for the following reasons. Firstly, it was clear that PW 7 lied when she said PW 2 told her what to write in the statement which was in her own hand writing and she admitted this under questioning from the Crown.

Secondly, the statement has a generous of detail which could only be narrated by a person who knew what occurred. Some of the details therein contained cannot be expected to be known by a girl in PW 7's position who lives in the rural area, her modicum of sophistication being taken into account. The statement tends to show the details given that the events therein described are probable.

Thirdly, the circumstances under which the statement was made in my view would render it in more accord with the truth. When the statement was made, the events were fresh in PW 7's mind. Furthermore, it is clear from the letters Exhibits B – E that she was unhappy with the treatment she was coerced to submit to by her mother. It can reasonably inferred that she was angry about the whole saga as it was done against her will and for that reason, she told the truth to the Police. Similar considerations cannot however apply to the evidence adduced in Court because it is clear that PW 7 was pressurised to falsify her evidence in order to protect the accused persons, particularly her mother, which she failed to do. The atmosphere at PW 7's home is described in the letters and was also exhibited in Court when PW 7's father was reported to me for intimidating PW 1.

Fourthly, this statement finds corroboration in the evidence of PW 2 Zwane, to whom PW 7 related the story on the 30th May, 1998. It also finds corroboration in the evidence of PW 12 regarding PW 7 going to Mbabane. Furthermore some of the items mentioned in the statement were eventually recovered by the Police and exhibited in court.

e) **The Defence case**

Accused 1, who gave sworn testimony denied procuring an abortion on PW 7 on the date alleged in the indictment or at all. She testified that PW 1's mother spoke to her about PW 7 and said PW 7 had been impregnated by PW 1 but was not certain if that was true. A1 says she did not answer. As they parted, PW 1's mother said A1 should not feel bad about this as PW 7 was dull which fact was evidenced by the fact that her peers were at the university.

A1 said she called PW 7 and confronted her about this but she denied being pregnant. This went on over some days. After schools were closed, PW 7 complained of pain somewhere and A1 gave her pain tablets (compral). In the evening, PW 7 called A1 outside where PW 7 was sitting. Under her was something on the ground. Asked what it was PW 7 said she did not know but it had come out from her. A1 took "this thing", but PW 7 in the house and disposed of this "thing".

Regarding PW 8's evidence, she denied having told PW8 that she wanted PW 7 to terminate the pregnancy. She said all that she did was to enquire from PW 8 whether it was in accordance with culture for the boy's mother whose son impregnated your daughter to tell of you of the pregnancy as PW 1's mother had done.

Explaining her meeting with PW 8 and PW 9, A1 said she was at a station with the two and she asked them if PW 1's mother's actions were proper and they were surprised. She agreed that she asked PW 8 to speak to Fikile, but Fikile denied being pregnant, even to PW 8. She denied telling PW 9 that she was contemplating terminating PW 7's pregnancy.

She was asked if she knew A2 when PW 7 fell pregnant and she admitted, saying A2 was a neighbour at Malindza and that she approached A2 about PW 7's matter. Later she turned around and said she did not know A2 until they appeared together before Court.

Regarding a further meeting with PW 1's mother, A1 said that she was going to Mozambique to buy clothes when she boarded a bus in Simunye. PW 1's mother was in the bus. She testified that the latter wanted to assault her because A1's husband had wanted to kill PW 1 with a firearm. She testified that PW 1's father, who was also there, brokered peace and they reached home amicably.

She then related the events relating to the meeting at Malindza. Members of the vigilante group came to see her husband and asked him to go to Gwebu's homestead for talks. A1 was asked to accompany her husband and to listen to the proceedings. On arrival there, PW 2 ordered her to sit in the middle of women and her husband to sit in the middle of some men. The men there were carrying weapons. PW 2 said he was there to broker peace between the two families as he had been informed that A1's husband went to PW 1's home carrying a firearm.

They then spoke about the pregnancy and PW 7 was sent for. When asked, PW 7 said the pregnancy had disappeared. When pushed to explain, A1's husband told her (A1) to answer. She said she knew what happened to the foetus but would not let PW 1's family take it. PW 2 became incensed and threatened to assault A1. As a result, A1's husband said she should let them have the foetus. They dug it out, brought it to Gwebu's homestead. PW 2 said he was solemnizing a marriage between PW 1 and PW 7.

Around 19h00, PW 2 took PW 7 and A1 to Manzini Police Station and said the statements must contain what he wants, failing which he would take them for punishment at the place where community police administer punishment. A1 stated that she did not agree with the contents of PW 7's letters read in Court.

She was cross-examined at length by the Crown. I will not chronicle the details of the cross-examination however.

Accused 1 was very poor as a witness. She was very hesitant and evasive in giving some of her answers. In short, she was unimpressive as a witness. In some instances, she deliberately avoided answering clear questions that she clearly understood and the Court was called upon to warn her accordingly on those occasions. In other cases, she was uneasy and would sigh before answering the questions which would otherwise be answered without any difficulty.

There are obvious difficulties with A1's case. Firstly, there is direct evidence that she was the perpetrator in the commission of this offence. Sadly, she failed effectively to challenge this evidence. There was the evidence of PW 2, who informed the Court of the proceedings of the meeting at Malindza, and the fact that this accused person was confronted about the abortion and she did not deny her part. As a result, the foetus was recovered and she pointed it out before the community police first and later before the RSP. This pointing out is in my view admissible and it was not suggested otherwise by the defence.

Her explanation that she was threatened is nothing but outright falsehood because according to her evidence, she did not come there as an accused but came accompanying her husband against whom a complaint had been made. PW 7 in cross-examination said she does not know how A1 was threatened. Even the manner in which the alleged threats were made is totally unconvincing.

Secondly, she stated that this was a miscarriage which occurred on its own. This is also a lie because of the evidence led at the meeting about what she did and her utterances to PW 8 and PW 9, where she said she had resolved to cause PW 7 to abort the foetus. Furthermore, she failed to explain as to why she never informed PW 1's family of the unfortunate "miscarriage", if it was indeed one. There was also no explanation as to why PW 7, if feeling an urgent need to urinate would urinate behind the house when there was a toilet in the homestead. This is a complete lie. The Doctor opined that the foetus was expelled through unnatural means and held that an abortion was possible, giving reasons for that conclusion. It is also significant that A 1 never bothered to take PW 7 to hospital for medical care if indeed the expulsion was uninduced.

Thirdly, the evidence of PW 8 is that A1 told her, in the company of PW 9 that she had decided that PW 7's pregnancy must be aborted. PW 8 said she unsuccessfully tried to dissuade A1 from her decision. PW 8 said on another day, she met A1, who told her that A1 would meet a Khanyisile who would take PW 7 to people who would "help" her. PW8 asked PW 7 why she was weeping hysterically, PW 7 said that she did not want to go there A1 was telling her to go. Again PW 8 dissuaded A1 from proceeding with her intentions but to no avail.

PW 9 also confirmed that A1 had also told her that she wanted PW 7 to commit an abortion and her attempts to dissuade A1 fell on rocky ground. This was notwithstanding that she told A1 that she herself was a dropout from school because of a pregnancy, but A1 would not be persuaded to change her mind.

There was also the evidence of PW 1 regarding the letters. PW 7 mentioned that A1 was forcing her to commit an abortion and later informed PW 1 that A1 had prevailed and she considered herself a murderer. All that A1 said in relation to these letters was that she did not agree with them. That was not enough to rebut such strong evidence against her.

The letters stated that PW 7 had been caused by A1 to drink certain medicines which PW 7 had refused. She further stated that she had been taken to Mbabane where she refused and was to go back later. The contents of these letters are also confirmed by the evidence of PW 2, together with the statement that PW 7 made to the RSP and which she tried to depart from in her evidence in Court.

The above items of evidence faced A1 squarely but she failed to challenge them. Her explanations, if any had very little or no effect.

The other difficulty for A1 was that she gave evidence in chief, in which she mentioned certain items of evidence for the very first time. These were not put to any of the Crown witnesses, and they include the following:-

- She told Court that PW 1's mother wanted to assault her after the "miscarriage" and also told the community police to assault her;

- That PW 2 threatened her by saying that he would take A1 and PW 7 to a forest and would there mete out treatment which would cause A1 to say what PW 2 wanted A1 to say. She alleged that he said she would have to "look for a tortoise," an undisclosed method of torture.

- That PW 2 wanted A1 to say that she was the person responsible for the abortion and that he said this since the meeting started. This would of course be untrue as A 2 said the meeting was to broker peace between the two families and A1 was not "accused" but merely accompanied her spouse in order to listen to the proceedings.

- Regarding her response to the evidence of PW 8, relating to her intention to have PW 7 under go an abortion, A 1 denied having said so but for the first time said that she asked PW 8 if it was culturally acceptable for PW 1's mother to tell her of the pregnancy.

- Again, it was never put to PW 8 that PW 7 was crying because she was maintaining that she was not pregnant, not that A1 was forcing her commit an abortion.

- It was never put to any of the Crown's witnesses that when asked about the foetus at the meeting, A1 refused to give the Gwebu's the foetus because they were not related to A1 and her family.

- It was never put to PW 2 or PW 1 that he declared that PW 2 and PW 7 were

married and that they should continue procreating. Further, it was never put to PW 2 that if PW 1 had no hut, PW 2 would furnish material for PW 1 to build one so that PW 1 could sleep in it with PW 7.

The approach to be adopted by the Court relating to such evidence was stated with absolute clarity in the case of **S v P 1974 (1) SA 581 at 582 (**per Macdonald J.P.)**; R V DOMINIC MNGOMEZULU & OTHERS CRIM. CASE NO.94/90** at page 17. Hannah C.J. (unreported case). The evidence was not put to the Crown's witnesses, thus depriving the Court of the opportunity to see their reaction thereto. I am fortified therefore, in concluding that this evidence by A1 was an afterthought.

It also became very clear that A1 lied when she testified that she had never met A 2 before arraignment. This became evident in her facial expressions. As properly recorded in **CLARK v EDINGBURGH AND DISTRICT TRAMWAY CO. 1919 SC (HL) 35,** an observant judicial officer may sometimes determine the demeanour of a witness "in their hesitation, in the nuance of their expressions, in even the turn of an eye lid."

Furthermore, in chief, the following exchange occurred between A1 and her attorney as recorded in my notes:-

Q: When Fikile's pregnancy arose, did you know A 2
A: Yes she was our neighbour

Q: Where was she your neighbour
A: Malindza

Q: Did you approach her regarding this matter. How did you approach her and what did you say?
A:

At this point A1 then said that she had misunderstood the question but failed to explain in a satisfactory manner as to whom she thought reference was being made to in the question. I may well mention that it cannot be said this was due to language problems because although there was a good and able interpreter, in many instances, A1 answered the questions even before they were interpreted.

Furthermore, the contents of PW 7's letters mentioned Mbabane and PW 7 going there and A1 also going there. There is also PW 8's evidence that A1 told her that she would look for people to "help" PW 7 by terminating the pregnancy. I find therefor for a fact that A1 and A2 knew each other before arraignment at the Magistrate's Court. The denial that they knew each other is nothing but a facile attempt to conceal the truth.

From the foregoing, I have no hesitation in concluding that the totality of evidence against

A1 is overwhelming and the Crown has succeeded in proving A1's guilt beyond a reasonable doubt.

A2 on the other hand testified as follows:-

That she did not know A1 and PW 7 prior to her arrest in connection with the issue before Court. She denied having procured a miscarriage on either of these. She testified further that she does not know how to procure an abortion and did not know how to do so even in 1998.

It was her evidence that she was not at Malindza during the meeting and that she had never been confronted with A1 and PW 7 over this issue. She told the Court the identity of the persons who stayed with her at the Nurses home in Mbabane. She denied seeing PW 7 in her home in Mbabane and proceeded to deny seeing A1 there also.

She denied seeing the medical instruments before Court and further denied PW 12's evidence that she had seen the items at her place of residence. It was her evidence that she knew nothing about the same. She stated further that she was a staff nurse who did mid-wifery. She however denied carrying the title of Sister, which in effect dressed her in borrowed robes, stating that she heard this for the first time in Court.

In cross-examination, it was established that she joined the profession in 1975 and had twenty-five years experience. When asked if she knows what is to be done in order to terminate a pregnancy, A2 answered in the affirmative, stating however that she has no authority to terminate a pregnancy, that being the sole prerogative of Doctors. She stated that she was taught how to terminate pregnancies together with all the steps involved at the Central Hospital Institute in Maputo, Mozambique.

She denied as false that PW 12 removed the medical items. She denied that PW 12 visited her in Prison and during which visit she enquired about the items. She denied further that the items were in her wardrobe. She failed to state why PW 12 would fabricate evidence against her. A2 also denied that PW 7 ever came to her home.

In re-examination A2 was asked if she had seen the items before Court and her evidence was that she had never seen any of those items. She hastened to add that none of them were used in the midwifery section in the hospital.

A2 also was very evasive and hesitant in answering questions. She also avoided answering clear and direct questions, opting instead, to answer irrelevant questions. She also contradicted herself on material issues and adopted a useless stance of denying everything, which at the end rendered the bulk of her evidence nothing else but an unrehearsed fabrication.

For example, when led in chief by the defence attorney, she was asked if she had seen medical items before Court at her house in 1998, she hesitated before saying "No". She also hesitated when asked to respond to PW 12's evidence that the items were seen in her bedroom.

She contradicted herself regarding whether she knew how to carry out an abortion. In chief, she said she did not. In cross-examination however, she conceded that she did and had been

taught all the steps involved. To demonstrate this, I will quote extracts from my notes when she was subjected to cross-examination:-

Q: You know how to procure a miscarriage
A: No. But the Doctor knows. I do not know if they do it in Swaziland because I have worked in the maternity ward until I went to the theatre (Note *this question is irrelevant and is not an answer to a question not asked*).

Q: You have just said that you know what the doctors do but you are not allowed to do it.
A: Yes. I was taught this at Institute Central Hospital in Maputo. I was taught all the steps.

Q: You know how to conduct a miscarriage not that you did it
A: (Gave an irrelevant answer then said) I do not know how it is done. I know it is done when necessary.
Q: You are now contradicting yourself. Earlier, you said you knew how
A: You are taught how it is done. Doctors only do it. Nurses are not allowed to do it. I was told how to help a patient with a miscarriage until a doctor arrived.

Q: If you were not required to call a doctor, you could do it yourself
A: Yes. I know how to help a person.

In short, A2 was very poor as a witness and it became clear that she lied. One example was when she was asked about the procedure by which a pregnancy is induced and she said that induction (inducement) was not a medical term. When asked to tell the Court the proper medical term, she said it in Portuguese and in Portuguese, she gave a similar name and was hard pressed to say why she had told the Court that it was not a medical term. She then attributed this, falsely in my view, to her poor understanding of English, which is inexplicable, regard being had to her service in Swaziland, spanning some fifteen years.

The evidence against A2 is contained in the evidence of PW 2, who informed the Court that PW 7 told the gathering that she did not wish to have an abortion but that A1 told her that her life was ruined and that A1 would take PW 7 to a nurse in Mbabane and that the nurse would demand E300.00 for the procedure, which A1 borrowed from another lady.

PW 7 then told the gathering that A1 took her to Mbabane and was there introduced to A2. Later PW 7 went alone and A2 administered an injection and inserted certain instruments in her genitalia which eventually led to the expulsion of the foetus. PW 7 also mentioned that the nurse involved was a Mdluli.

The statement that PW 7 attempted to derogate from confirms PW 2's story. In addition, there is evidence in PW 7's letters that she went with A2 to Mbabane and there, she refused, clearly to submit to an abortion. She stated that she was due to return to Mbabane later in the same week.

There is also the evidence of PW 11, who testified that she saw PW 7 two times at her home. This was also during the dates mentioned in the letter and was also around the dates alleged

in the indictment. In my view, all these different pieces of evidence show that PW 7 went to A2's house on two occasions in May. PW 11 was convincing in her evidence and no reason was suggested as to why she would fabricate evidence against her mother.

There is also corroboration for the borrowing of a sum of E300,00 although the reason for borrowing was different. PW 9 stated that she lent that sum to A1 who said she would buy stock. PW 7 said it was to pay the nurse for her "service".

I also take cognisance of A2's denial of the items produced in Court. She said she never knew these and they had never been in her house. PW 12 said she saw them there and that A2 knew them as she was a nurse. Again, no reason is advanced as to why PW 12 would lie against her mother. Furthermore, PW 12 says that she was asked to remove the items and keep them in a safe place which she did but the Police found them. A1 expressed a concern to PW 12 that the items were found. I believe her evidence and reject A2's evidence as the former was honest in my view but the same cannot be said of A2.

A2 also denied ever seeing any such items and said these were never used in the mid-wifery section. That is outright falsehood. Doctor Austin Ezeogu, told the Court that these were used in the mid-wifery section and he was not controverted. He further testified that most of them are used in procuring an abortion like the speculum, uterine curate, artery forceps, foley catheter and other medicines found. It cannot be true that A2 had never seen any of the items before because there were injections, medical gloves, which any layperson would know and identify. A2 was trying her level best to distance herself from these items. However, her denial had the opposite effect.

I noted in particular, that as Dr Ezeogu adduced his evidence, especially about the items used in an abortion situation, A2 looked down intermittently and was very uncomfortable throughout the Doctor's sojourn in the witness box.

Furthermore, the items recovered by the RSP are mentioned in PW 2's evidence as those referred to PW 7 in her speech during the meeting. I dare say that those are also mentioned in the statement made by PW 7. In particular, PW 2 referred to an injection being administered, a drip, the vagina speculum, the uterine curate and the foley catheter. These were mentioned many months earlier and before the items were found by the Police and were handed in as exhibits before court.

As stated earlier, it is clear that A1 and A2 knew each other. The fact that the meeting at Malindza took place in A2's absence is of no consequence. PW 7 implicated her in that meeting and the Police, armed with the information, arrested A2 and proceeded to charge her.

Like with the evidence of A1, certain issues were never put to the Crown witnesses. For that reason, these fall to be disregarded in the light of **S v P** (supra) and **R v DOMINIC MNGOMEZULU AND 9 OTHERS** (supra). These issues include the following: -

- it was never put to any of the Crown witnesses, particularly to PW 2 and PW 7 that A 2 did not know how to procure an abortion.

- it was never put to PW 12 that she only shared the bedroom with A2 when her brother was there. PW 12 had told the Court that she shared the bedroom with A 2.

- it was never suggested to PW 11 that she could not have seen PW 7 because she, PW 11 was staying with A 2's daughter Florence Nightingale Mashaba from 17th April to the end of May, 1998.

- it was also not put to PW 11 that she was not at the house when she said PW 7 was there. All that was sought to be questioned was whether she had properly seen PW 7 and whether she could have identified her, given the circumstances.

From the foregoing, I have no doubt that A2 is the one who administered certain drugs to cause the expulsion of PW 7's foetus and that this was at A1's instigation.

The evidence against A2 was strong but she failed in my view, to give a plausible explanation. All that she set out to tell the Court was outright falsehood. A2 is found guilty as charged.

I am also of the view that the Crown succeeded in proving common purpose in this case. In this regard, it is apposite to quote with approval the remarks of Tindall J.A. in **REX v DUMA AND ANOTHER 1945 AD 410 AT 415,** where the following excerpt is recorded:-

> "*The liability of persons who assist in the carrying out of a common criminal purpose was considered in the case of* ***R v GUNSWORTHY AND OTHERS.*** *In my opinion, the principles applicable were formulated with substantial accuracy by Dove Wilson J.P. in following terms:-*
>
> *Where two or more persons combined in an undertaking for an illegal purpose, each one of them is liable for anything done by the other or others of the combination in furtherance of their object. If what was done was what they knew or ought to have known would be the probable result of their endeavouring to achieve their object. If on the other hand what is done is something which cannot be regarded as naturally and reasonably incidental to the attainment of the object of the legal combination, then the law does not regard those who are themselves personally responsible for the act as being liable. But if what is done is what anybody engaging in this illegal combination would naturally or ought naturally to know would be the obvious and probable result of what they were doing, then all are responsible."*

In view of the foregoing, it is clear that A1, who was afraid of her husband's reaction to her daughter's pregnancy, set out with a vaulting ambition to terminate PW 7's pregnancy. Because she failed to do it herself, she engaged the expert services of A2, who carried out the procedure, gave the foetus to PW 7 who took the same to A 1. The latter buried the foetus.

I have anxiously considered this matter and had regard to **S v MOTTIODA 1973 (1) PH H 24 N,** where the following appears:-

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> *" The proper approach in a criminal case is to consider the totality of the evidence, that is to say, to examine the nature of the State case, the nature of the defence case, the probabilities emerging from the case as a whole; the credibility of all the witnesses in the case, including the defence witnesses, and then to ask oneself, at the end of all this, whether the guilt of the accused has been established beyond a reasonable doubt. It is not a proper approach to hold that, because a Court finds that the State witnesses have given evidence in a satisfactory manner, the defence evidence must be rejected as false."*

On full consideration of the case, I am of the view that the Crown has established the guilt of both accused persons beyond a reasonable doubt. Both accused persons are guilty as charged.

There is however one matter that deserves mention. This case posed some serious challenges relating to the admissibility of certain items of evidence. In terms of the provisions of Section 223 of the Act, issues of admissibility of hearsay evidence is dependent on the Supreme Court of Judicature in England. My research and enquiries have revealed that this Court was abolished some time ago. The problem that arises is-in view of the absence of this Court, how will the Court deal with evidence in issue? Must it be as at the time when that Court was still operating and if so, how will the evidence of the admissibility of any item be proved as a fact before this Court unless a person admitted to practise there is called to testify? What about the difficulty in securing such persons and the financial implications?

As a result, many South African authorities are increasingly being relied upon by our Courts on the question of the admissibility of hearsay evidence. This may result in our Courts going against the express directions given in Section 223 as aforesaid and in relation to civil matters, against the provisions of the Civil Evidence Act, 1902, which contains similar provisions as Section 223.

In the Republic of South Africa, statutory exceptions o hearsay evidence have been promulgated to ease the work of the Courts, thus setting the law of evidence in clear perspective. In our jurisdiction however, I am not aware of any concrete plans to legislate matters relating to the law of evidence, thus placing the Courts in an invidious position regarding how to deal with aspects of the law of evidence, particularly in the light of the abolishment of the Supreme Court of Judicature. This situation cries for immediate attention

by the Legislature, especial regard being had to the notorious fact that the CP&E is over 60 years old and cannot therefor be expected, in the absence of meaningful amendments to be responsive to modern day challenges and realities.

I would in this regard appeal, as many Judges may have done before me to the Legislature, to address this issue without delay. I say this recognizing that many decisions by this Court relating to the need for amendment of certain pieces of legislation have not been attended to e.g. the Elections Order 1992, relating to setting up a dispensation in the Order for dealing with complaints; the Civil Service Order and related pieces of legislation and their inconsistency; the absence of provisions dealing with prosecutions of companiesin the C,P & E.

I order that this judgement should be circulated to the Attorney-General and the Director of Public Prosecutions for them to bring the concerns raised to the relevant offices for appropriate action. Hopefully, the promptitude with which some pieces of legislation have been attended to in recent times will not be spared this and the other pieces of legislation which have been the subject of judicial comment.

T.S. MASUKU

JUDGE