THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 41/2000

In the matter between

REX

Vs

ANDREAS SIPHO DLAMINI

VELAPHI THEMBINKOSI SHONGWE

Coram	S.B. MAPHALALA – J
For the Crown	MISS LUKHELE
For the Defence	MR. M. DLAMINI

JUDGMENT

(19/03/2002)

The accused person is charged with two counts, to wit:

Count one

That the accused is guilty of the crime of murder, in that upon or about the 16th February 1999, and at or near Maphatsindvuku area in the Lubombo region, the said accused did unlawfully, wrongfully and intentionally kill Moses Mgulumba Sithole and thereby committed the crime of murder.

Count two

Accused is guilty of contravening the provisions of *Section 11 (3) as read with 11 (8)* of the *Arms and Ammunitions Act 24/1964* as amended, in that upon or about the 6th July 1999, at or near Maphatsindvuku area in the Lubombo region, the said accused, not being the holder of a valid permit or licence to possess the component of a firearm, did unlawfully possess the components of a .303 rifle

excluding only the butt and thereby contravene the provisions of the aforesaid Act.

The accused person pleaded guilty to the second count, and not guilty to the first count.

An overview of the crown's evidence

The crown called a total of 11 witnesses to prove its case.

In this case the crown relied on the evidence of Pw1 Velaphi Shongwe – an accomplice witness. PW1 related to the court that on the 16th February 1999, he and the accused person were together drinking at the accused junior homestead when one Lomadlozi Maziya (PW2) arrived. PW2 informed the accused that a case where the deceased was the complainant had been reinstated. This, according to the accomplice witness, angered the accused who started threatening to kill the deceased. PW1 further stated how he and the accused proceeded to the deceased's home with the intention of killing the deceased. He warned the accused on several occasions against carrying out such a plan. In fact, according to his testimony he warned the accused person eight (8) times. He was then forced by the accused to accompany him to the deceased's homestead. As means to ensure that the accused wishes were carried out PW1 was punished by being made to walk in zig-zag when they were on their way to Sithole's homestead.

He told the court that the accused got a gun and they proceeded thereto. He gave details as to him being the one who knocked on the deceased's door and that he heard the deceased say he was going out. At that point in time the accomplice heard the gun being fired and the deceased collapsed. The deceased was later found lying dead on the ground by his wife Thandi Mngometulu (PW4). PW4 stated that after 7.00pm her husband (the deceased) went outside for water when suddenly she heard the sound of a gunshot. She never went outside to investigate until the next morning a neighbour Lomadlozi (PW2), also heard the gun shot sound at about the same time.

The following morning police were called in and deceased was examined. Photographs of the scene were taken and handed in as exhibit B1, B2 and B3. A sketch plan was drawn marked exhibit "A". According to the investigator, Detective Constable 2188 Roman N. Ndzimandze (PW10), following the report of the deceased's murder he conducted the investigations. Subsequently, the accused and the accomplice witness were arrested on different dates, the 7th July 1999 and the 3rd July 1999 respectively. He further stated that after he had duly cautioned the accused person, the accused led him to a certain homestead where a trunk box and .303 rifle were retrieved. These were marked exhibit 1 and 2 respectively. On the 8th July 1999 the rifle was taken to a force armourer (PW8 Jabulane Gamedze) to test its serviceability. The firearm was tested in the presence of the accused person and he found that it was unserviceable.

On the 9th July 1999, the accused person was taken for a formal remand at the Magistrate's court. The accused was charged with murder on the 7th July 1999 and

charged with possession of a firearm thereafter following the accused failure to produce a licence. The accused person retrieved the rifle and PW7 Sifiso Vilane testified to that effect.

Further Dr. K. Reddy (PW11) was called in as a medical expert although he did not conduct the actual autopsy. In his evidence he confirmed that the entry wound was from the back and exit was upfront. PW11 also stated that the point where deceased was shot was such that he died immediately. He gave a detailed explanation using exhibit (1, 2 and 3), where he stressed the importance of a jugular vein and the carotid artery. It was abundantly clear from his testimony that the deceased died of the gunshot as it was also positioned in a very vital part of the body.

The evidence by the defence

The accused person gave evidence under oath being led by his attorney. He gave a lengthy account of his version of events. He told the court that he was a soldier in the Umbutfo Swaziland Defence Force and he is also a Sergeant in the community police force of Maphatsinduku where the tragic events took place on the day in question. He told the court that he was in his junior homestead enjoying a "buganu" brew when he was joined by PW1 and later on Lomadlozi joined them. The time was about 4.00pm. Later on he walked together with Velaphi (PW1) to his other homestead. They parted ways when PW1 proceeded to his homestead. He was drunk when he got to his homestead. They went to sleep for the night. The next morning a certain child from a nearby Hlophe homestead came to report that Sithole the deceased had been shot. He then contacted the other members of the community police. He together with Velaphi Sigwane went to the homestead of the deceased. They found the deceased wife who related to them what happened to the deceased. The deceased was lying in a pool of blood in the yard – dead.

He ordered the people who were at the scene not to disturb the scene until the police came for their investigations. He took one community police officer (Nkwanyane) and they proceeded to the Siteki Police Station to report the matter.

Then they went to the homestead of the deceased together with the police. The police proceeded with their investigations. They took photographs of the scene and subsequently took the body of the deceased. Thereafter, he instructed the members of the community police to be on the look-out for clues as to how the deceased met his death.

After three months he got a report that the police wanted him. He proceeded to the police station. He found a certain Constable Ndzimandze with other officers who asked him about a certain firearm which belonged to his late uncle. They told him that they need the firearm because it had been reported to them that the firearm was no longer legal. He then together with the police proceeded to his uncle's homestead where he called for one Mapitsane to give him the keys. They then went to open the hut and he retrieved the firearm which was stored in a trunk-box. They then all went back to the police station where he made a statement concerning the firearm and the other exhibits.

On the following day when he went to the police station Constable Ndzimandze charged him with unlawful possession of the firearm. They then locked him in the cells. The following day they went to Matsapha to have the firearm tested by a force armourer. They were then taken to a Magistrate for a formal remand where the Magistrate set the trial date for the 9th July 1999.

On the following day the police took him out of the cells to an office for interrogation. There were many officers inside this office. He was made to sit in a chair in the centre of the room. They showed him the pictures of the deceased. One of the officers took one of the pictures and hit him in the face with it saying that they have heard that he was the one who had shot the deceased. He denied any involvement in the brutal death of the deceased. The police proceeded to torture him by using a plastic bag which was put over his head to suffocate him. He was forced to admit having shot the deceased. They suffocated him until he bled from the nose. Another officer amongst his inquisitors intervened stopping the others from inflicting further torture. They told him that Velaphi, the accomplice witness had already made a statement before a Magistrate and that it would be wise if he did the same. They produced a certain form which they read to him and that he should not tell the Magistrate that they are the ones who suggested that he should come to him. They read the form to him and schooled him on what to say. They told him that the statement he should record with the Magistrate should be the one they were told by the accomplice witness. That if he did not make this statement they will come and continue with the torture.

He was then taken to a Magistrate to record a confession. He told the Magistrate what he had been schooled to say by the police fearing the reprisals of further torture. He was then taken by the police to the police station where he was charged with the murder of Sithole. On the 9th July 1999, he was taken to the Magistrate court where he met the accomplice witness who was co-charged with him in the murder charge.

The accused was cross-examined at length by the crown. The accused then closed his case without calling any witness to support his story.

The crown's submissions

Miss Lukhele made submissions at great length that the court ought to accept the evidence of PW1 – the accomplice witness. The accomplice evidence was clear and satisfactory in all material respects. That it is competent for this court to convict the accused on the basis of the evidence of the accomplice witness. She directed the court's attention to ***Section 273*** of the ***Criminal Procedure and Evidence Act No. 67 of 1938*** and also the case of ***Rex vs Mandla Maphalala and another*** by Sapire CJ.

She contended that the court must exercise caution as against the evidence of an accomplice witness (see ***Rex vs Ncanana 1948 (4) S.A. 399 A.D.; R vs Mhawu Dlamini 1970 – 76 S.L.R. 13, R vs Mthembu 1982 – 86 S.L.R. Vol (1) 17*** and the case of ***Mncube & another vs R (CA) 1982 – 86 S.L.R. 59***). The evidence of PW1 was corroborated in all material respects, for instance:

a) PW2 confirmed that she found PW1 and the accused together at the accused home on the 16th February 1999.

b) PW2 testified that she in fact told the accused about the reinstatement of the deceased case and accused got angry. Subsequently, a song which raised suspicion was sung by accused and PW1.

c) PW2 stated that she heard the sound of a gunshot at about the same time as that stated by PW1.

d) PW3 failed to locate the accused on the date in question as he was reported to have left with PW1.

e) PW6 testified that the accused admitted that the deceased died in the hands of the accused and PW1.

The evidence of PW3, PW4, PW6, PW8, PW10 and Pw11 according to the Crown confirm in whole material issues in the evidence of the accomplice witness. Thus the evidence of PW1 is credible. PW1 was consistent in all material respects. The only contradiction regarding the evidence of being made to walk in zig-zag does not go into the root of the matter. The accomplice witness is not necessarily expected to be wholly consistent and wholly reliable, or even wholly truthful, in all he says. The ultimate test is whether, after due consideration of the accomplice's evidence with the caution which the law enjoins, the court is satisfied beyond reasonable doubt that in its essential features the story he tells is a true one. (see ***S vs Francis 1991 (1) S.A. 198 (AD)).***

On the issue of the admission, it is contended by the crown that PW6 testified that the accused admitted to him that the deceased died in the hands of PW1 and himself. He further admitted that he lost his temper following the report that the case wherein the deceased is complainant had been reinstated. He admitted that the firearm belonging to him was used to shoot and kill the deceased (see ***Section 227*** of the ***Criminal Procedure and Evidence Act (supra)*** and the case of ***S v Cele 1965 (1) S.A. 82***. This proves a fact in issue especially as it was voluntarily made. It will suffice if it is put to the witness that he concocted the story any time between the event and the trial evidently, in the evidence of PW5.

Lastly, Miss *Lukhele* contended that on the other hand the accused has shown prior inconsistent statement which have been invented and after thought in an effort to deny the crown's evidence. She further invited the court to draw certain inferences: that the accused is a soldier who is expected to know how to operate firearms including the rifle in question; the accused had access to the rifle in question, knows how to operate it and definitely knows that it cannot be dismantled thus broke it intentionally; the accused resides within the area close to the deceased homestead. PW2 was amongst people who heard the gunshot sound which accused himself should have heard, there was a criminal case pending against the accused and a law suit as stated by PW3. Thus the accused had a motive to kill the deceased; and there is evidence of

pointing out. The accused after being duly cautioned and warned subsequent to the murder charge he led the police to where the weapon used was. He did this freely and voluntarily.

Therefore, in the fact of the evidence as a whole there is sufficient proof of guilt and accused should be found guilty as charged.

The defence's submissions

Mr. *Dlamini* for the accused argues with all the force at his command as follows: The only crown's evidence that seeks to connect the accused to the commission of the offence is the evidence of PW1, the accomplice witness. He directed the court's attention to the *ratio decidendi* in the celebrated case of ***S v Hlapezulu and others 1965 (4) S.A. 440*** as regards the legal position that the trial court should warn itself of the danger of convicting upon the evidence of an accomplice witness. The following was enunciated:

> "…First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope for clemency. Third, by reasons of his inside knowledge he has a deceptive facility for a convincing description – his only fiction being the substitution of the accused for the culprit. Accordingly… there has grown up a cautionary rule of practice requiring:
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> a) Recognition by the trial court of the foregoing dangers and;
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> b) The safe guard of some factor reducing the risk of a wrong conviction, such as corroboration implicating the accused in the commission of the offence, or the gainsaying evidence from him or his mendacity as a witness or the protection by the accomplice of someone near and dear to him".

It is for these reasons that the court will always require an accomplice witness to be a trust-worthy witness in every material respects. As such, when his evidence is analysed, it must not be shown to have contradictions that are material (see ***R vs Mphopotshe (supra)***. In ***casu***, according to Mr. *Dlamini*, PW1 was duly and carefully warned to tell the truth including the role he played during the commission of the offence. Yet when one analyses his evidence, it is very clear that it was exculpatory in nature. This is shown by his intention to kill the deceased. He warned him on several occasions against carrying out such an intended plan. In fact his testimony is that he warned the accused eight times. That he was forced by the accused to accompany him to deceased homestead. His evidence was that he went with the accused to Sithole's homestead because accused had told him that he was to shoot him if he refused to go. As a means to ensure that accused wishes were enforced, PW1 was punished by being made to walk in zig-zag when they were on their was to Sithole's homestead. At Sithole's homestead, PW1 ran away after the

gun shot was fired. The reason for PW1 not to report the incident to any person before his arrest was because accused had strongly warned him not to do so. Under cross-examination PW1 told this court that if he were to report to the police, accused had threatened to shoot everything coming onto his way, including police dogs. Mr. *Dlamini* argued that PW1's evidence is exculpatory and that he attempted by all means to push the blame to the accused person and thus failing to disclose the role he played in the commission of the offence.

Mr. *Dlamini* went further to outline to the court that the evidence of PW1 is full of contradictions. Further that notwithstanding the fact that PW1 was an accomplice witness, as he is the single witness connecting the accused person with the commission of the offence, a further caution should be exercised by this court following the *dicta* in ***S vs Sauls and others 1981 (3) S.A. 172 (A) at (E – G)*** where **Diemont JA** expressed the following:

> "There is no rule of thumb test as formula to apply when it comes to a consideration of the creditability of the single witness… the trial judge will weigh his evidence and consider its merits and demerits and having done so, will decide whether, despite the fact that there are short comings or defects or contradictions in the testimony, he is satisfied that the truth has been told"

He contended further that even if the court were satisfied with the nature of PW1's evidence, the court may still look for corroboration implicating the accused as one of the factors to be taken into account (see ***S vs Mhlabathi 1968 (2) S.A. 48 (A)***) that the degree of caution in this case is much higher than that of any ordinary accomplice witness as PW1 is also a single witness linking accused to the commission of the offence and therefore the caution is doubled. The other factor which again may influence the court to find in the favour of the Crown is when the accused has chosen not to deny the accomplice evidence on oath. Per **Holmes JA** in ***S v Snyman 1968 (2) S.A. 582 (A)***:

> "Where there is direct evidence that the accused committed the crime, in general his failure to testify (whatever reason therefore) *ipso facto* tends to strengthen the state case, since there is no testimony to gainsay it and therefore less occasion or material for doubting it".

In the instant case, however the accused person contradicted PW1's evidence under oath and stated his defence. Even if this court may find that PW1 is a credible witness and believe his evidence after cautioning itself, still the court will have to look for further evidence to prove a case against the accused. Mr. *Dlamini* argued that no other evidence other than the accomplice evidence exist, in ***casu***. The evidence of PW6 is inadmissible in that it may be categorised as a confession by the accused person. ***Section 226*** of the ***Criminal Procedure and Evidence Act*** prohibit ***inter alia***, a confession if it has not been proved to be:

> "Freely and voluntarily made by such a person in his sound and sober senses and without having been unduly influenced therefore".

The Crown has an *onus* to discharge that such confession was made freely and voluntarily in terms of the said Section. In the present case no effort, whatsoever was made by the Crown to prove that such a confession was made in terms of the Section. On that basis alone the evidence of PW6 in so far as it relates to a confession made by the accused to PW6 is inadmissible.

On the issue of the firearm, Mr. *Dlamini* argued that even though PW1 attempted to identify it as the firearm used by the accused there is no evidence beyond a reasonable doubt that such firearm was the one used in the commission of the offence. PW1 stated upon being asked by counsel for the crown that: *"this is the gun that was carried by accused even though I cannot identify it"*. The question therefore is if PW1 cannot identify the firearm, why is he testifying that such was the firearm? There were also no cartridges or any bullet found in the deceased body or at the scene of the offence which link the firearm possessed by the accused to the murder. The firearm was not taken for ballistic tests to establish whether it was the weapon used in the commission of the offence.

The Court's conclusion

I have carefully considered the evidence before me in *toto* and the very helpful submissions by both counsel, to which I am most grateful. It is common cause that the only direct evidence that it was the accused who shot the deceased was that of the accomplice witness, PW1 Velaphi Thembinkosi Shogwe.

The classic statement of what has been described as *"the common rule of practice"* in dealing with accomplice evidence is contained in the judgment of ***Schreiner JA*** in the South African Appellant Division in the case of ***Rex vs Ncanana 1948 (4) S.A. 399 (A) at pages 405 – 406*** where the following appears:

> "What is required is that the trier of fact should warn himself, or if the trier is a jury, that it should be warned, of the special danger of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth. This special danger is not met by corroboration of the accomplice in material respects not implicating the accused, or by proof *aliunde* that the crime charged was committed by someone…The risk that he may be convicted wrongly…will be reduced, and in the most satisfactory way, if there is corroboration implicating the accused. But it will also be reduced if the accused shows himself to be a lying witness or if he does not give evidence to contradict or explain that of the accomplice. And it will also be reduced, even in the absence of these features, if the trier of fact understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of the accused is, in such circumstances, only permissible where the merits of the former as a witness and the demerits of the latter are beyond question".

This statement of **Schreiner JA** has been applied with approval by the Court of Appeal in the case of ***Jeremiah Petros Dludlu vs The King Criminal Appeal N.K.O. 12/93 (unrepoted)***, a judgement referred to, again with approval, in many subsequent cases. From the afore-going, it is clear that corroboration of an accomplice must be corroborated implicating the accused person in the commission of the crime, and that while the danger of convicting an accused person will be reduced where the latter is a lying witness, the court must appreciate that rejection of his evidence and acceptance of the accomplice is only permissible where the merits of the accomplice as a witness are beyond question.

Can that be said to be the position in this case? It appears to me from the reading of the evidence in its totality that PW1 was not a trustworthy witness and could not pass the test enunciated above. He contradicted himself in a number of respects as it has been shown by the defence. When Pw1 and accused parted ways, with accused going to his homestead and PW1 to his fields, the evidence of PW1 under cross-examination was that he had not taken the accused person seriously about the threats to kill the deceased especially because he was drunk at the time. When it was put to him that it does not appear in his evidence that he made efforts to prevent accused from committing the offence, PW1 then turned around to say that when he parted ways with the accused, he quickly went to his fields with a view of informing members of the public that accused person wanted or was planning to kill Sithole. It is strange, why PW1 opted to visit the fields first instead of announcing accused person intentions, especially because at the time, the accused, according to PW1, had not commenced any threats.

Secondly, PW1 testified that the reason for him not to tell anybody about the incident before he was arrested and kept in custody for three days was because he feared the accused very much. In as much as when accused instructed him to report to him first thing in the next morning, PW1's evidence was that, he first went to Siteki and then came back to meet accused at his homestead. I agree, in this regard with the submission made by the defence that, if indeed PW1 feared the accused, he would have struck to his "instructions" and avoid doing what was not agreed upon.

Thirdly, PW1 testified in court that contents of the statement recorded from him by the Magistrate were correct and were to the best of his knowledge. In court, however, his testimony was not consistent with the statement in several respects: i.e. in his statement PW1 gave evidence to the effect that they together with accused person walked in zig-zag, whilst in court he testified that accused instructed him to walk in zig-zag whilst accused walked normally. This contradiction is very material especially because in court, PW1 testified that accused zig-zag directive was a form of punishment. Then if accused person according to the statement made before the magistrate to the fact that the accused also walked zig-zag, then PW1 was not candid and honest to the court when he testified that the accused zig-zag directive was a form of punishment and force. In the statement before the Magistrate, PW1 gave evidence to the fact that after the gun shot was fired, he ran away straight to his homestead, yet in court he testified that when he attempted to run away, accused person held him and

told him not to run away. Again, this is very material because if accused person as alleged did not hold PW1, when he testified that he was held, clearly the intention was to mislead this court and to fortify his version that accused was indeed forcing him to commit the offence. PW1 told the Magistrate that he was ordered to "remain at a certain spot because he might spoil the whole operation". Further that accused walked a short distance, after which he "heard a gun shot" whilst he testified in court that he was actually ordered to knock at the door whereupon he heard voices inside the deceased hut; PW1 admitted to have written a statement at the police station that was different from the one that was recorded by the Magistrate.

In view of the reasons advanced and the submissions made by counsel for the defence it is my considered view that the PW1 was an untrustworthy witness and his evidence could not be believed. The accomplice witness in his own admission is a car thief who had some reputation in the area for his criminal activities. The caution sounded in ***S v Hlapezulu (op cit)*** should be applied in treating his evidence. At this juncture I must state that the facts of the present case have an uncanny resemblance with those of the case of ***Rex vs Hawuzile Maziya*** which appeared before me where I found the accused person in that case guilty of murdering one Ngwabela Jotham Vilakati and sentenced him to 15 years imprisonment. On appeal in ***Hawuzile Maziya vs Rex Criminal Appeal No. 23/99*** the Court of Appeal in the unanimous judgment of **Tebbutt JA** overturned the judgment on the basis that the only direct evidence of the accomplice witness one Bhani Maziya was flawed and failed to pass the so called *"common rule of practice"* propounded by **Schreiner JA** in ***Rex vs Ncanana (supra)***. I refer to the case of ***Hawuzile Maziya*** (op cit) to be at all fours with the case in ***casu*** and it would be worthwhile for counsel to study it.

Further, it would appear to me that PW1 has failed to disclose everything including his role in the commission of the offence. On closer analysis of his evidence it is very clear that his evidence was exculpatory in nature.

Lastly, as I have stated that the Crown's case stand or falls on the evidence of PW1 it would not be necessary for me to consider the others points raised in argument save to touch upon the evidence of PW6 who told the court that the accused made an admission as to how he killed the deceased. It would appear to me from the reading of the authorities cited by counsel for the defence that this piece of evidence is inadmissible as it may be classified as a confession and thus has to be governed by *Section 226* of the *Criminal Procedure and Evidence Act (as amended)*. The said Section prohibit ***inter alia***, a confession if it has not been proved to be:

> "Freely and voluntary made by such a person in his sound and sober senses and without having been unduly influenced therefore".

In the present case the crown has not proved that this statement was made in terms of Section 226 (see ***Hoffman and Zeffert, The South African Law of Evidence (4th ED) at page 172***).

On the basis on my conclusion on the evidence of PW1 it cannot be said in the totality of the evidence presented that the crown has proved its case beyond a reasonable doubt. The doubt therefore should go in favour of the accused person. The accused

person therefore is found not guilty in respect of the first Count and is acquitted forthwith. However, in respect of Count two that of possession of a firearm in contravention of the Arms and Ammunition Act he is found guilty on the basis that he pleaded guilty to the charge and the Crown has led evidence *aliunde* in this regard.

In the result, I rule as follows:

1. The accused person is found not guilty in respect of the first Count and he is acquitted forthwith; and

2. He is found guilty in respect of Count two for contravening the provisions of the *Arms and Ammunition Act No. 24 of 1964 (as amended).*

S.B. MAPHALALA

JUDGE