IN THE HIGH COURT OF SWAZILAND

CRIMINAL CASE NO. 72/01

HELD AT MBABANE In the

matter between: REX

VERSUS

TILILI ZWAKELE SHIBA

CORAM **SHABANGU AJ**

FOR CROWN **P. DLAMINI**
FOR ACCUSED **MR MABILA**

Ruling on application in terms of Section 174(4) of the Criminal Procedure and Evidence Act 67/1938 30th March, 2004

The accused, one Tilili Zwakele Shiba has been indicted in this court on a charge of culpable homicide, it is alleged that

> *"... upon or about the 13th March, 2000 and at or near Mangwaneni area in the district of Hhohho, the said accused acting unlawfully, did wrongfully pour petrol on Musa Dludlu who then caught fire and suffered severe burns on his body, which burns caused the death of the said Musa Dludlu, and the said accused did thereby negligently kill the said Musa Dludlu, and thus did commit the crime of culpable homicide. "*

The crown adduced evidence during the trial and closed its case after calling a number of witnesses. None of the witnesses could testify on how the deceased caught fire and got burnt. The highest point of the testimony of the witnesses called by the crown referred to serious arguments and quarrels between the accused and the deceased which were said to

have occurred during the evening of the previous day. There was also the evidence of Phumlile Mavimbela who resided in the same house with both the accused and the deceased. This witness testified that after the quarrel and arguments of the previous evening between the accused and the deceased they went to sleep. This witness further says that when she woke up the next morning she overhead the two argue again whereupon the accused stated that the deceased might not find the house on retorning from work that day. The deceased is said to have responded to this by saying if this were to happen the accused would also "follow the house". This witness says on waking up she prepared to go out to collect water outside the house. She says that her brother was also preparing to go to work when she left the house. She continued to testify that as she reached the water spot she heard a loud noise of her brother screaming. On directing her eyes towards the house, which was seventy metres, from where she was, she saw her brother holding his private parts and screaming for help. At that time the accused was also outside the burning house holding her baby who was badly burnt. According to the evidence given by one Ntombi Sithole the accused appeared to be in a state of shock.

With the evidence as summarised above the crown closed its case. The defence made an application for an acquittal and discharge of the accused in accordance with the provisions of section 174 (4) of the Criminal Procedure and Evidence Act, 67 of 1938, as ammended. That section was ammended by The Criminal Procedure and Evidence (Amendment) Act, 14 of 1991. The ammended section now reads 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. "*

It is trite that the test to be applied in an application by an accused for an acquittal and discharge at the close of the crown's case, is whether there is evidence on which a reasonable man, acting carefully might or may convict the accused.

From the manner of the formulation of the charge it is clear that the *actus reus* according to the allegations contained therein, is that "the accused poured petrol on Musa Dludlu

who then caught fire and suffered severe burns on his body, which burns caused the death of the said Musa Dludlu." It is further alleged in so far as the element of *mens rea* is concerned that the accused negligently killed the said Musa Dludlu. The alleged unlawful act therefore is that of "pouring petrol" on the deceased. The further allegation would be that the accused was negligent in his act of pouring petrol on the deceased. On this aspect one of the crown witnesses Phumlile Mavimbela testified in chief that on the evening of the previous day the accused took petrol and poured it on the body of the deceased around the shoulder. However later during cross-examination when it was put to this witness that she could not have seen the accused pour petrol on the deceased she replies as follows;

"Yes I did not see them, but I heard my brother say Tilili why do you pour petrol on me."

It has not been suggested by the crown during submissions or at any stage that it was this incident which allegedly occurred during the evening of the previous day,, which caused the deceased to catch the fire. There is no evidence from which it can be inferred or suggested that any petrol which might have been poured on the deceased during the evening of the previous day might have caused the deceased to catch the fire. There is no evidence of the amount of the petrol which^may have been poured on the deceased. This must be considered in light of the fact that the deceased is said to having been having a bath at the time his sister left the house to fetch water. In any event from the quoted aspects of the evidence it appears that the witness does not say that she did see the accused pour petrol on the deceased. All that this witness says in cross-examination is that she overheard a conversation between the deceased and the accused wherein the deceased apparently accused the accused of pouring petrol on him. The statement by the deceased would be inadmissible hearsay.

Other than the incident of the previous day there is no direct evidence, at least, of the accused having poured petrol on the deceased resulting in the latter catching fire. The next question which arises therefore is whether in the absence of direct evidence, there is in existence circumstantial evidence which would justify a conclusion that the injuries on

the deceased were caused by fire which he caught as a result of being poured with petrol by the accused and that from the circumstances of the case the accused ought to have forseen that her act of pouring petrol on the deceased would result in the deceased being severely burnt on his body and that from such severe burns the deceased would probably die, and the accused was reckless whether this consequences resulted from his act or not. That the court may rely on circumstantial evidence to call the accused to his defence wherein after the close of the crown's case, an application is made for the acquittal and discharge of the accused cannot be questioned. (See **SV. COOPER & OTHERS 1976 (2) SA 875 at 889. See also RV. BLOM, 1939 AD 188 at P. 202).** In **SV. COOPER 1976 (2) SA 875 at 889 E - F** the learned judge Boshoff, **J** made the following observation;

> *"The Judge,...when deciding at the close of the case for the prosecution whether there is evidence that the accused committed the offence, has to accept the evidence of the witnesses as uncontradicted and decide thereon whether a reasonable man might draw therefrom the inference or inferences sought to be drawn by the prosecution. "*

Earlier on in his judgement, dealing with circumstantial evidence in general, Boshoff **J** observed at pages **888H - 889A** of the same judgement,

> *"When triers of fact come to deal with circumstantial evidence and inferences to be drawn therefrom, they must be careful to distinguish between inference and conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture ... The dividing line between conjecture and inference is often a very difficult one to draw, but it is just the same as the line between some evidence and no evidence. One often gets cases where the facts proved in evidence - the primary facts - are such that the tribunal of fact can legitimately draw from them an inference one way or the other, or, equally legitimately refuse to draw any inference at all. But that does not mean that when it does draw an inference it is making a guess. It is only making a guess if it draws an inference which cannot legitimately be drawn; that is to say, if it is an inference which no reasonable man could draw. "*

The so-called "two cardinal rules of logic" which guide the court in the assessment of

circumstantial evidence in a criminal trial and as laid down in **RV. BLOM 1939 AD 288**

by **WATERMEYER J.A.** are that ;

> *"(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.*

(2) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct. "

However, as **HOFFMAN AND ZEFFERT** in the **SOUTH AFRICAN LAW EVIDENCE** 4th edition at page 507, point out in an application for the acquittal and discharge of the accused at the close of the state case ;

"Where the states' case is circumstantial and permits a number of inferences, a discharge should be refused if one of the inferences is that the accused is guilty." See also **SV. COOPER & OTHERS** *supra.*

It would seem therefore that at this stage of the proceedings, the court is not required to examine whether the second rule of logic in RV. BLOM *supra* is satisfied. In other words the inference that the accused committed the offence with which she is charged need not be the only inference that may legitimately be drawn from the proven or undisputed facts, at this stage. It is sufficient at this stage that the proven or undisputed facts permits of a number of inferences, including one inference that the accused committed the offence. When one of the inferences is that the accused is guilty, the application for acquittal and discharge in terms of section 174 (4) should be refused.

There are a number of undisputed facts on the evidence which justify an inference that the accused may have committed the offence of *culpable homicide*, with which she is charged. These are (a) the fact of the continuous quarrels or altercations between the deceased and the accused which according to the evidence had begun during the previous evening, (b) The fact that on the morning of the incident of the fire which erupted from the house in which both deceased and accused resided, that is, on Monday 13th March 2000 the two were heard by Phumlile Mavimbela to have been again exchanging heated words and arguments, (c) That during the course of the argument the accused was overheard threatening to burn the house down, when she interalia, told the deceased that he would not find the house and that it would be burnt when the deceased would return from work, (d) The deceased is said to have responded to this threat by saying that if the house is no longer there because of being burnt she would have to follow the house

(whatever that meant), (e) The witness Phumlile Mavimbela left the house, leaving the accused and the deceased in such a state, (f) The main characteristic of the altercation, which started during the previous evening, and as described by the witnesses who testified was that accused was accusing the deceased of having an affair with a widow. All these facts are consistent with the inference which the crown argues should be drawn, namely, that the accused is guilty of culpable homicide. The accused having been the only person who was with the deceased in the house when the fire broke out is in a position to explain the above facts. A prima facie case which calls out for an answer from the accused has been made out. The expression *prima facie* case is used in both senses discussed by **HOFFMAN AND ZEFFERT,** *supra* at page 596 where the learned authors observe;

> *"Like so many terms in the law of evidence, prima facie evidence is used in two different senses. It sometimes means evidence upon which a reasonable man could find in favour of the party adducing it; that is to say, the amount of evidence which a plaintiff must produce in order to avoid having absolution decreed at the end of his case, or which would be sufficient to prevent an accused from being discharge at the end of the prosecution's evidence. It is often said that in the absence of such evidence there is 'no case to answer', but the refusal of absolution or discharge does not necessarily mean that an answer is required. The defendant or accused may close his case at once and still succeed. In this sense, therefore, a ruling that a party has "made out a prima facie case" means only that his opponent runs the risk of losing if he offers no evidence. Although this meaning of prima facie evidence is in constant use, there is another which is even more common* In the other sense one is dealing with what may be better called 'prima facie proof and the different meanings attached to the words prima facie evidence have been remarked on by JANSEN J.A in MARINE & TRADE INSURANCE CO LTD V. VAN DER SCHYFF1972 (1) SA 26 (A) at 37. In Ex parte Minister of Justice : re R V. JACOBSON and LEVY, 1931 AD 466 at 478, STRATFORD J.A. said 'prima facie evidence in its usual sense is used to mean prima facie proof of an issue, the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, prima facie proof becomes conclusive proof and the party giving it discharges his onus.' In this sense, prima facie evidence means evidence capable of being supplemented by inferences drawn from the opposing party's failure to reply."*

I use the expression prima facie proof, therefore, in accordance with the second signification referred to in the above quoted passage by **HOFFMAN & ZEFFERT,** *supra.* In other words, the case against the accused *"cries"* for an answer, in the sense that it is capable of being supplemented by inferences which may legitimately be drawn from her failure to testify, if she were to choose not to testify. On whether such inferences can legitimately be drawn in a particular case the learned authors state;

"Whether such inferences may legitimately be drawn depends upon the nature of the case and the evidence which has been adduced. Most important, it depends upon 'the relative ability of the parties to contribute evidence on that issue.' If the evidence adduced by one party can reasonably support an inference in his favour, and it lies exclusively within the power of the other party to show what the true facts were, his failure to do so may entitle the court to infer that the truth would not have supported his case. On the other hand, if there is no reason to expect a party to be able to throw light upon the facts, his silence can add nothing to the evidence adduced by his opponent."

On the facts of this particular case the accused being the only other person in the house with the deceased, it lies exclusively within her power to show or demonstrate the true facts. This fact considered in light of the facts already alluded to above satisfies me that a prima facie case has been made out against the accused.

On the basis of the aforegoing the application for an acquittal and discharge of the accused in terms of section 174 (4) is refused.

ALEX S. SHABANGU
ACTING JUDGE