IN THE SUPREME COURT OF SWAZILAND

Held at Mbabane **Appeal Case No. 35/2010**

CITATION: [2010] SZSC 13

In the matter between:

LINDA KIBHO MAGONGO	**APPELLANT**
AND	
THE KING	**RESPONDENT**
CORAM	**FOXCROFT JA**
	TWUM JA
	FARLAM JA
FOR THE APPELLANT	**IN PERSON**
FOR THE CROWN	**MR. P. DLAMINI**

JUDGMENT

(Murder – appeal against conviction and sentence – accomplice witness – cautionary rule – whether proposition put by attorney for another accused during cross-examination of a Crown witness can support evidence against accused on appeal – cautionary rule not satisfied – murder conviction set aside – conviction on robbery charge confirmed but backdating of sentence corrected)

FOXCROFT JA :

[1] The Appellant, convicted on a charge of murder and two counts of robbery, appeals only against his conviction and sentence for murder. The appeal turns on the safety of the conviction which rested on the single evidence of an accomplice witness.

[2] The requirement of section 237 of the Criminal Law and Procedure Act No. 67 of 1938 that the crime charged be proved by evidence *aliunde* to the satisfaction of the trial court to have been committed was correctly held to have been fulfilled in this case. What remained were the requirements of the so-called cautionary rule regarding the evidence of an accomplice. As stated in this court in **PIKININI SIMON MOTSA v REX,** Appeal Court Case No. 36/2000 (unreported),

> "That Rule is no more than a reminder to the court that a facile acceptance of the credibility of certain witnesses may lead to false conclusions. At the same time it has often been stressed by the court that the exercise of caution must not be allowed to

replace the exercise of common sense. **S V SNYMAN 1968(2) SA582 (A) at 585."**

As this court, per Browde JA, went on to point out, corroboration of an accomplice is not the only manner in which the required cautious approach can be satisfied.

> "Any factor which can, in the ordinary course of human experience reduce the risk of a wrong finding will suffice e.g. the failure by an accused to cross-examine Crown witnesses on material aspects of the case, or to put his version to witnesses or were the accused himself to attempt to mislead the court by palpably false evidence."

Browde JA then went on to say

> "Finally, I should add that even if the above facts are absent, it is competent for a court to convict on the evidence of an accomplice provided the court understands the peculiar and oft-stated dangers inherent in accomplice evidence and appreciates that rejection of the evidence of the accused and the acceptance of that of the accomplice are only permissible where the merits

of the accomplice as a witness and the demerits of the accused are beyond question."

[3] The judgment of this Court in **MOTSA v REX**, supra, follows upon the decision, among others, of Nathan CJ in **R v MTETWA** where the learned Judge said at 367B-C **1976 SLR 364 (HC)** that :-

> "This is accomplice evidence. In terms of s 237 of the Criminal Procedure and Evidence Act 67 of 1938 a court may convict on the single evidence of any accomplice provided that such offence has by competent evidence other than the single and unconfirmed evidence of such accomplice, been proved to the satisfaction of the court to have been actually committed. The section does not require that there should be corroboration implicating the accused; but nevertheless, as is pointed out by Hoffmann South African Law of Evidence 2nd ed p399, corroboration implicating the accused still falls to be considered under the well known "cautionary rule."

[4] **R v MTETWA,** supra, was, in turn, reflecting a well established practice in Swaziland, as well as in other former High Commission Territories. This is evidenced

in the decision in **BERENG GRIFFITH LEROTHOLI and others v THE KING** (1926 – 1953) H.C.T.L.R. 149, (P.C.)

[1950] A.C. 11 (P.C.). The Court, there dealing in 1949 with section 231 of the Basutoland Criminal Procedure and Evidence Proclamation, 1938, as amended, held that the section only required additional evidence that an offence had been committed. Nevertheless

> "a Judge in Basutoland, as elsewhere, must always have in mind the danger of accepting evidence which is uncorroborated by independent evidence." (Per Lord Reid at 158)

The Privy Council went on to cite Schreiner JA in **R v Ncanana** (1) 1948 (4) SA 399 (AD).

[5] A year later, the Privy Council, in **GIDEON NKAMBULE**[1.] **and others v. The King**, (1926-1953) H.C.T.L.R 181 at 196; [1950] A.C. 379 which was an appeal from the Swaziland High Court, said

> "In Leretholi's case the cautionary rule which is followed in South Africa was brought to the notice of

---

1.Nkambule's case contains a useful summary at p 185 of the history of the law relating to accomplice evidence, commencing with the

Swaziland Administration Proclamation of 1907 declaring that the law to be applied is the Roman-Dutch law except in so far as replaced by subsequent legislation.

See also the formulation of Holmes JA in **S v Hlapezula and others** 1965 (4) SA 439 (AD) at 440 D-H.

the Board, and is set out in the wording used by Schreiner, JA in R v Ncanana. Their Lordships agree with the conclusion reached in Lerotholi's case that the cautionary rule so stated is that binding in Swaziland as it was in Basutoland, and are satisfied that it was present to the mind of the judge who convicted the appellants and was properly applied by him."

The words of Schreiner JA in **R v Ncanana** were what Browde JA had in mind in this court in his decision in **R v MOTSA**, supra.

[6] It is also important to remember that before looking for corroboration of an accomplice's evidence, the court must first decide whether the witness is credible. If not, the matter is at an end since the need for corroboration does not arise.

See : Hannah CJ in **R v MANDLA HOMEBOY DLAMINI,** 1986 SLR 384 at 387 D-F, quoting **S v MUPFUDZA** 1982 (1) ZLR 271 cited with approval in Botswana in **MONAGENG v THE STATE,** CA 37 of 1983.

[7] The learned Judge a quo correctly held that the requirements of section 237 of the Criminal Procedure and Evidence Act No. 67/1938 had been met. Having thus satisfied herself she examined the question

> "What of the accomplice witness: was he a credible witness" (Record, p. 369)

The learned Judge dealt with the evidence of the accomplice and found that it had been given in an honest and forthright manner, and that he had not been discredited in cross-examination. On the other hand, so it was found, the accused persons were often evasive when they were cross-examined, making bare denials

> "especially Accused 2 who was known by Pw4"

[8] The learned Judge proceeded to say

> "I have already set out in paragraph 44 credible evidence of other witnesses which implicate the accused." (Record, p370)

It is important to note that paragraph 44 of the judgment concerned the

> "**Death of the deceased : Count 1"**

The first point raised under this sub-heading is

"Pw2 who was able to identify the accomplice witness Pw1 places Pw1 at the scene of the crime."

The witness made clear that he only recognized his "assailant" (the accomplice) and this evidence in no way implicates the appellant. The next five bullet points also do not relate in any way to the appellant.

[9] The only one of these points advanced in argument before us concerned what Mr. Mngomezulu for Dw2 had put to the accomplice in cross-examination. What was put was a statement that the defence of the second accused (Dw2) was that he (Dw2) was in the company of the appellant (Dw1) on the 22nd October 2005 going to Phocweni to feed on mangoes. This suggestion was denied by the accomplice, and was not confirmed by DW2 in his own evidence.

[10] While it is possible that Dw2 had given instructions to his attorney to put the "mango-picking" version to the accomplice, he certainly gave no such evidence at the trial. While the putting of this "defence" might well be a factor to be taken into account in the decision to accept the evidence of the accomplice against Dw2, it

cannot carry any weight against Dw1 – the appellant- nor was it admissible against him.

[11] In the first place, if Dw2 gave false instructions about mangoes to his attorney and then did not confirm this version in evidence, why should the alleged instructions from Dw2 be believed at all? Secondly, the putting of a "defence" of presence on the scene of the crime for innocent purposes (i.e. picking mangoes) by an attorney on behalf of Dw2 cannot, in my view, amount to a confession or admission by Dw2 somehow involving Dw1. While it may colour a finding that the evidence of the accomplice against Dw2 is supported by this behaviour on the part of Dw2, it can have no bearing upon Dw1.

[12] The court a quo found that "these disclosures through Mr. Mngomezulu place Accused 1 and Accused 2 squarely at the murder scene". In my view such a "disclosure" unsupported by evidence cannot implicate the appellant. Mr. Dlamini submitted on behalf of the Crown that this "disclosure" by the attorney not representing the appellant entitled the trial court to find that this

> "admission made on behalf of accused number 2 also confirmed appellant's presence at the scene

as they did not amount to a confession in the true sense."

This submission confuses the issue of the admissibility of an unequivocal admission of guilt (confession) with the trite principle that any statement by one accused about the alleged involvement of a co-accused, if not repeated in evidence, cannot be used against the co-accused.

[13] In the Commentary on the Criminal Procedure Act 51 of 1977 in South Africa, **Du Toit et al** point out in their commentary to section 219 of that Act that

"An admission is as a general rule not admissible against anyone except its maker unless it can be brought within some other exception to the hearsay rule. Section 219 provides specifically that no confession shall be admissible against any person except its maker, and the same is true of other admissions in both criminal and civil cases (see S v BANDA and Others 1990 (3) SALR 466 (B)[1].

To this general rule, however there have arisen certain exceptions in terms of which an admission made by A

will be admissible against B. These exceptions are generally referred to as vicarious admissions.

[14] Two main categories of vicarious admissions are generally recognized. The first relates to persons authorized to speak on behalf of another. A legal representative is an obvious example. An admission of fact made at a trial by an attorney acting within the scope of his authority is admissible against his client. If an attorney puts to a Crown witness that his own client

---

1. The relevant pages are 526F-527B

will testify that he, the client, was present on the scene of a crime together with a co-accused, that statement by the attorney would have no probative value and would not be admissible against the co-accused. Since the attorney has no authority to speak for the co-accused the statement does not fall within the ambit of a vicarious admission.

[15] In the present case, Dw2 did not support the proposition put to the accomplice (Pw1) as to his presence on the scene of the crime. Indeed it was suggested to him by counsel for the Crown that he had changed his instructions to his attorney in maintaining

that he had gone to Paper Mills to look for a job on the day of the murder. While this may have had some bearing on the conviction of Dw2, who is not before us on appeal, it cannot constitute support for the finding that the words of the attorney representing Dw2 can be used against Dw1. Of course, if Dw2 had testified that Dw1 was on the scene where the murder took place, for the innocent purpose of mango picking, (and had been believed) the learned trial Judge would have been fully entitled to regard that as supportive of the evidence of the accomplice.

To use the words of the attorney for Dw2 as supportive of the accomplice against Dw1 is not permissible in law and constituted a misdirection on the part of the learned trial Judge.

[16] This places this Court back in the position where the trial Judge was, ignoring the statement put by the attorney of Dw2 to the accomplice. As for the credibility of the accomplice, there are certain disquieting features in his evidence. After a great deal of prevarication and dissembling from page 86 to 90 of the record, he resolutely refused to admit the inconsistency between his initial statement to the police that he knew nothing about the offences with

which he was charged and his evidence in court. In regard to this part of his evidence he was anything but forthright. His argumentative refusal to answer simple questions from the questioning attorney eventually resulted in the attorney showing understandable frustration and accusing the accomplice of wasting the time of the court.

[17] The trial Court found that the accused persons were "often evasive" when cross-examined, and made bare denials

> "especially Accused 2 who was known by Pw4."

No detail of any "bare denial" by the appellant is provided in the judgment. Nor does the record reflect evasiveness.

It does reflect a warning by the trial Judge to Dw1 not to "keep on evading questions". In my view this warning was not justified. It is clear that the witness was not disagreeing with what had been said in court by earlier witnesses but with the truth or otherwise thereof. It is also understandable that the witness might have been a little wary of cross-examining counsel for the Crown after counsel had, a little earlier in the evidence, wrongly stated to the witness that the appellant's version had not been put by his attorney

when it had. The Court had pointed out Crown counsel's error, and he offered no apology despite his earlier comment that "the record will bail us out" (Record 251)

[18] In the absence of any corroboration, the evidence of Pw1 could of course have been accepted if the "merits of the accomplice as a witness and the demerits of the accused [had been] beyond question." In my view, they were not. I also do not agree with the submission of Mr. Dlamini for the Crown that the Court was correct in finding that the appellant made bare denials. An example from the record was cited by counsel (p 32). It was submitted that Pw3 had implicated appellant saying that appellant had come to his house on the 22nd October 2005 and that they had gone to Phocweni meeting accused 2 on the way. In the first place Pw3 did not say this. Pw1 did. Secondly, it was put to Pw1 that the appellant was not part of the group of assailants at the dam on that day.

Mr. Dlamini also submitted that what was put to Pw1 amounted to a bare denial since all that was said was that

> "My instructions further from the first accused was that he was not amongst the assailants at Phocweni in both instances."

and

> "I put it to you that you are not telling the truth that my client was one of the assailants, but you are protecting the real culprit."

In the light of the evidence of the appellant which was to come, namely that he was in Manzini that day, he was quite entitled to put, through his attorney, statements to the witness which amounted to statements that he was not at Phocweni when the murder was committed. What was being put was the accusation that the appellant was being substituted for the real culprit who was thereby being protected. This was not a bare denial and no other example of any "bare denial" on the part of the appellant was raised by the Crown. There is no merit in the argument. It follows that the uncorroborated evidence of the accomplice in regard to the charge of murder should not have been accepted by the trial court. The conviction was unsafe and must be set aside.

[19] There was no appeal in regard to the convictions on counts 6 and 7. Those convictions accordingly stand.

The appellant drew to our attention the fact that the warrant dated 2 February 2010 to the Gaoler of the Mbabane Gaol reflected the commencement of his sentence as 11 October 2006. He contended that the trial court had backdated his sentence to his original date of arrest i.e. 28 January 2006. It was pointed out to him that he had not been confined after his first arrest and that the date of his re-arrest was 5 August 2006. He was satisfied with this date and Crown counsel agreed that the correct date for purposes of the backdating of the sentence was 5 August 2006.

[20] Accordingly,

(a) the appeal succeeds to the extent that the conviction for murder is set aside.

(b) The convictions for robbery on counts 6 and 7 are confirmed.

(c) The sentence of five years imprisonment without the option of a fine is confirmed, but backdated to 5 August 2006.

The Prison authorities are directed to correctly reflect in all appropriate records the correct backdating of the sentence to 5 August 2006.

_____
J.G. FOXCROFT
JUDGE OF APPEAL

I AGREE.

_____
DR. S. TWUM
JUDGE OF APPEAL

I AGREE.

_____
I.G. FARLAM
JUDGE OF APPEAL

Delivered in open court at Mbabane on 30th November 2010.