IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE **CRIMINAL APPEAL CASE NOs: 20 and 21/2015**

In the matter between:

MFANIMPELA MBUYISA **1ST APPELLANT**

SONTO NKOSI **2ND APPELLANT**

AND

REX **RESPONDENT**

Neutral Citation: *Mfanimpela Mbuyisa and another vs. REX (20 AND 21/2015) [2017] SZSC 05 (12 May 2017)*

Coram: **DR. B.J. ODOKI, JA**
S.B. MAPHALALA, JA
J.P. ANNANDALE, JA

Date heard: **15 FEBRUARY 2017**

Date delivered: **(12 May 2017)**

Summary: *Criminal Law and Procedure −Appellant charged with murder − Conviction based on the evidence of a single accomplice witness − Whether evidence of the accomplice credible − Whether cautionary rule properly applied − Section237 of the Criminal Law and Procedure Act No. 67 of 1938 − Whether doctrine of common purpose applicable where the Appellants hatched a plan to kill the deceased and plan was carried out − Evidence accomplice witness found credible and sufficient to sustain conviction against Appellants who had a common purpose − Sentence of 15 years against each appellant found not harsh or excessive nor based on a wrong principle. − Appeal against conviction and sentence dismissed.*

JUDGMENT

DR. B.J. ODOKI J.A

[1] The first Appellant, Mfanimpela Mbuyisa, and the second Appellant Sonto Nkosi, were convicted of murder. The trial Judge found extenuating circumstances in favour of the Appellants on the basis of a belief in witchcraft, and sentenced each of them to ***Fifteen (15 Years)*** imprisonment, without and option of a fine.

[2] The Appellants have separately appealed to this Court. The 1st Appellant has appealed against conviction only, while the second Appellant has appealed against both conviction and sentence.

BACKGROUND

[3] The background to this case is as follows: Swazi Mdluli (PW8) who was an accomplice witness and had been charged with the same offence gave the main evidence implicating the two Appellants, which evidence was accepted by the trial Judge. PW8 testified that in December 2009 he attended a meeting called by the 2nd Appellant during which the death of the deceased Hezekiah Masuku was planned. The meeting was also attended by the two Appellants and Mcebo Hlophe (PW3) who confirmed attending the meeting. The first Appellant requested PW3 and the 1st Appellant to kill the deceased and she would pay them E40 000,00 (forty thousand Emalangeni). However, the plan was abandoned because the first Appellant failed to provide the money she promised to pay them.

[4] During early January 2010, the 2nd Appellant telephoned the 1st Appellant while PW8 was present. The 2nd Appellant was by then residing in South Africa and had hired PW8 to look after her house in Ngelane.

During the telephone conversation, the 2nd Appellant reminded the 1st Appellant of their previous plan to kill the deceased and informed him that she still wished to go ahead with their plan. She promised to pay PW8 a sum of E1 000 the 1st Appellant would pay PW8 another E 1000 and an unnamed relative would pay a further sum of E1 000 bringing the total to

E3 000.

[5] PW8 stated that sometime later the 1st Appellant gave him a cell phone with instructions that he would phone him on it when it was time to carry out the killing at 3.00am. The 1st Appellant indeed telephoned him at the arranged time and he went to meet him at home.

[6] Initially they had a difficulty as to how they would draw out the deceased from his house and how they were going to kill him. The 1st Appellant came up with a plan. He telephoned the deceased and told him that a child of PW8 was ill at the 1st Appellant's home and needed to be treated by the deceased. The 1st Appellant mimicked a woman's voice over the telephone.

[7] The 1st Appellant thereafter sent PW8 to go and fetch the deceased and pretended to take him to the 1st Appellant's house. Earlier, when the 1st Appellant had phoned PW8 the caller had armed himself with a bolt-nut stick, before venturing out.

[8] PW8 went to fetch the deceased as instructed by the 1st Appellant. The deceased obliged, put on his coat and took a torch and *muti* and they set off to the 1st Appellant's home. Meanwhile the 1st Appellant had hid behind the house armed with a sharp iron rod.

[9] At about 50 meters away from the deceased's house, the deceased indicated that he wished to urinate. While he was urinating, PW8 struck him with the bolt-nut stick. He struck him on the right side at the back of his head. He struck again on the right ear and the deceased fell down.

[10] After the deceased had fallen down, PW8 became frightened because the deceased had not died. He turned to the 2nd Appellant who had been following closely and informed him that deceased had not died.

The 1st Appellant then struck the deceased with the iron rod saying that he was going to finish him off. The iron rod was sharp on one side like an axe. After the 1st Appellant had struck the deceased, he came to where PW8 was standing and told him that the deceased was now finally dead and that they should leave the scene and go back to sleep.

[11] At around 6.00am, PW8 was woken up by someone raising an alarm for help outside as the body of the deceased was discovered. A lot of people came and someone called the police. The 1st Appellant telephoned the 2nd Appellant who was still in South Africa and the 2nd Appellant advised both of them to remain in her house and not go to the scene of crime. The 2nd Appellant promised to return home the same day and she arrived at about 10.00am.

[12] On the day of the funeral, the 2nd Appellant instructed PW8 to remain in her house and not to attend the funeral. She paid PW8 a sum of E1 000 Several days after the funeral of the deceased, the Community Police began investigating the deceased's death.

They questioned PW3 who gave them information which led to the arrest of the 1st Appellant. The 2nd Appellant had by then already run away to Johannesburg and PW8 had fled to Piet Retief where he stayed with the 2nd Appellant's brother.

[13] After three weeks, PW8 returned to Ngelane and while there, one morning the 2nd Appellant arrived so that they could go and perform some traditional cleansing rituals on both of them so that the Police would not arrest them for the murder of the deceased. The 2nd Appellant arrived with a *sheep* and some *muti*. The ritual consisted on both of them using the *muti* with which to vomit and the wash themselves while uttering words that the Police should not arrest them. They mixed their vomit and washing water and fed it to a sheep. The sheep was taken to a far off Mkhondo area where they let it go. The idea was that it would go away and never be found, likewise the charge of murder would disappear into the unknown.

[14] After the cleansing ritual the 1st Appellant went back to Johannesburg and instructed PW8 to return to Piet Retief. After two weeks, the 1st Appellant, 2nd Appellant and PW8 returned home from South Africa and found that the Police were looking for them.

The 2nd Appellant instructed PW8 to leave the country. Meanwhile the two Appellants were arrested.

[15] PW8 fled to Piet Retief. After a short while, the 2nd Appellant telephoned him to leave Piet Retief and go to hide in Ermelo, and he did so. When the 2nd Appellant was released on bail, she sent PW8 a sum of E 500 for his rent. The 2nd Appellant would regularly telephone him to find out how he was.

[16] After a while, the 2nd Appellant neglected PW8 and the South African Police arrested him and deported him as an alien during September 2013, via Oshoek border gate. He was arrested on the Swazi side after his deportation. He spilled the beans about the death of the deceased because the 2nd Appellant had neglected him while he was at Ermelo. At the Police Station he discovered that both Appellants had shifted the blame onto him and had exonerated themselves.

[17] The *post mortem* examination revealed that the deceased died of multiple chop wounds on his head and the injuries were consistent with having been caused by a sharp axe, bush knife or chopper used to cut meat or an object with a sharp cutting edge.

[18] Both Appellants denied the offence. The 1st Appellant denied participating in the crime, and the 2nd Appellant pleaded that she had abandoned the plan to kill the deceased.

[19] The trial judge in the cour***t a quo*** believed the evidence of the accomplice witness as credible and dismissed the versions tendered by the accused. The trial Court then convicted the Appellants as charged.

THE APPEAL

[20] The first Appellant noted his appeal against his conviction on 21st September 2015, which contained three main grounds of appeal, namely:

"The court a quo erred in law and in fact when convicting the Appellant in that the court a quo relied entirely on the evidence of PW8, the accomplice witness whose evidence was not credible because;

1.1 A1 (PW8) stated that the Appellant was present when the plan to kill the deceased was made yet such evidence was contradicted by PW3 who stated that he attended the meeting and the Appellant was not in attendance.

1.2 A1(PW8) told the court that the deceased was woken up at night to attend to a child who was said to be at A2's homestead yet the deceased as a resident of the area know very well that there was no child staying at 2nd Appellant's homestead.

1.3 A 1 (PW8) told the court a quo that the Appellant had promised to pay him money if he killed the deceased but he A1 (PW8) never demanded any payment from the Appellant, he also did not complain to anyone about not receiving payment from the Appellant yet was able to complain to PW3 about not receiving payment from A2 (1st Appellant) after killing the deceased.

2. The court a quo committed a gross irregularity which resulted in a failure of justice by not considering the evidence of the Appellant and his witness (DW3 Nompumelelo Kunene) in its judgment.

3. The court a quo committed a gross irregularity which resulted in a failure of justice by discharging PW8 upon conclusion of his evidence before hearing all the witnesses and arguments in the matter, "thus giving the impression that the court a quo has prematurely came to the conclusion that the accomplice witness was a credible witness".

[21] On the other hand, the 2nd Appellant noted her appeal on 24th August 2015, against both conviction and sentence. In view of the contents of the grounds of appeal which touch on the role played by the appellant in the commission of the crime, I find it necessary to reproduce the grounds of appeal as stated by the Appellant.

[22] The grounds against conviction are stated as follows:

" (a) The Court a quo erred in law and in fact in finding that the Appellant took part in the murder of the deceased taking into account that she alleged that she divorced herself from the plan when called by accused 3 (1st Appellant) even though she raised that during the crown's case.

(b) The Court a quo erred in law and in fact in ruling that the Appellant acted in common purpose with his then co-accused when the murder was committed taking into account the fact that the Appellant divorced herself from the plan when called by accused 3 (1st Appellant) who had procured accused 1 (PW8) to kill the deceased which broke the chain of common purpose.

(c) The Court a quo erred in law and in fact in ruling that there was common purpose in the killing of the deceased between the Appellant and her then co-accused by way of payment to the accomplice witness yet there is evidence that the said accomplice had complained to PW3 that he had not been paid.

The accomplice made a bare allegation that he was paid by the Appellant without stating the date, time and form of payment.

(d) The court a quo erred in law and in fact in convicting the Appellant in light of the fact that the evidence led does not show her playing any active role in the act itself. She should have been found guilty of conspiracy to murder as that is the role she played.

(e) The Court a quo erred in law and in fact in believing the evidence of the accomplice witness taking into account the contradictions between the testimony of the accomplice and PW3 in material fact.

(f) The Court a quo in law and in fact in holding that the Appellant's failure to state in her testimony in chief that she had divorced herself from the plan worked against her as that was not denied by the 1st Appellant in his testimony which remains uncontroverted.

(g) The Court a quo erred in law and in fact in ruling that accomplice witness had no reason to lie against the Appellant when it was apparent that the accomplice was saving himself from the prosecution.

(h) The court a quo erred in law and in fact in not taking into account that the Appellant had put it to the accomplice that she tried to find him in order for the accomplice to exonerate her from any wrong yet the court believed that the Appellant had been abandoned by the Appellant whilst the accomplice was hiding in South Africa.

(i) The court a quo erred in law and in fact in not considering the fact that the accomplice had been kept in hiding after his arrest and the crown had ample time to school him on how to testify and have his testimony in line with that of the witnesses that had already given evidence."

[23] The ground in respect of appeal against sentence was stated as follows;

" (a) The sentences imposed by the court is excessively high taking into account that the Appellant did not take an active role in the commission of the offence such that it induces a sense of shock on the Appellant taking into account that the conviction is with extenuating circumstances."

ARGUMENTS OF THE FIRST APPELLANT

[24] Arguing the first ground of appeal, the Appellant submitted that the court ***a quo*** erred in convicting the Appellant in the evidence of the accomplice witness (PW8) when his evidence was not credible for a number of reasons.

[25] In the first place the accomplice witness was arrested when the trial had commenced and seven Crown witnesses had already given their evidence. Therefore the accomplice witness knew what the other witnesses had testified. It was the contention of the 1st Appellant that the only reasonable inference to be drawn from this is that the witness was told to testify in a manner that would implicate the Appellant and in return he would be indemnified from prosecution.

[26] In the second place, the evidence of the accomplice witness was contradicted by the evidence of PW3 regarding the presence of the 1st Appellant at the initial meeting where the plan to kill the deceased was agreed upon.

According to PW3, the 1st Appellant was not present, whereas the accomplice witness testified that the 1st Appellant was present. It was the submission of the 1st Appellant that this was a major contradiction which rendered the evidence of PW8 not credible and therefore it should not have been believed.

[27] Thirdly according to the evidence of PW8, the 2nd Appellant had hired him, PW3 and the 1st Appellant to kill the deceased and promised him a sum of E40, 000.00 yet under cross examination PW8 testified that each was to get a share of E20,000.00 which shows that he E40,000.00 was to be shared between two people.

[28] Fourthly, the 1st Appellant submitted that PW8 testified that the 1st Appellant had promised to pay him money if he killed the deceased, but PW8 never demanded any payment from the 1ST Appellant nor complained to any person about not receiving payment from the 1st Appellant, yet he was able to complain to PW3 about not receiving payment from the 2nd Appellant after killing the deceased.

[29] The 1st Appellant relied on several authorities to support his submissions regarding the credibility of PW8 and the need for the Court to act on the evidence of an accomplice witness with caution. Reference was made to Section 237 of the Criminal Procedure and Evidence Act No 67 of 1938, and the case of **S v Hlapezula** 1965 (4)SA 439 (A), **Jabulani Mzila Dlamini and Another v. R** Criminal Appeal Case No 16/12, and **Linda Kibho Magono v. The King**, Criminal Appeal Case No 25/2010. It was the 1st Appellant's submission that the evidence of the accomplice witness was not credible, and had to be acted on with caution in the absence of corroboration.

[30] The 1st Appellant complained in his second ground of appeal that the court ***a quo*** committed a gross irregularity by not considering in its judgment the evidence of the 1st Appellant and his witness (DW3 Nompumelelo Kunene). The Appellant did not elaborate on this ground, but submitted that he told the court that he had no reason to kill the deceased and would go to South Africa to collect money for fees.

[31] Regarding the third ground of appeal the 1st Appellant submitted that the *court* ***a quo*** erred in discharging PW8 upon conclusion of his evidence before

hearing all the witnesses.

It was his contention that this premature discharge gave the impression that The court ***a quo*** had already found the accomplice witness credible. It was argued that this discharge contravened the provisions of Section 234 of the Criminal Procedure and Evidence Act No 67 of 1938 which provides for discharge of an accomplice witness from liability after giving evidence . The Appellant also relied on the case of **Nico Ledube Nyamana v. The State** Case No. 43/88 where the South African Appellate Division of the Supreme Court observed that it was an irregularity for a court to discharge a witness from prosecution before the conclusion of the case.

ARGUMENTS OF THE 2ND APPELLANT

[32] The main submission made by the 2nd Appellant is that the court ***a quo*** made a wrong application of the doctrine of common purpose in convicting the Appellant, and secondly, that the evidence adduced at the trial did not suffice to convict the Appellant. It was the contention of the 1st Appellant that in criminal matters no matter how strong a suspicion may be that an accused has participated in the commission of an offence, it does not suffice

for the conviction of that accused person.

Reliance was made in the cases of ***Pius Simelane v. Rex,*** Criminal Appeal Case No. 2/97, and ***Obert Sethembiso Chikane v Rex,*** Criminal Appeal Case No.41/2000.

[33] The 2nd Appellant argued that the doctrine of common purpose is that where two or more person associate in a joint unlawful enterprise, each will be responsible for any acts of his fellows which fall within their common design or object. The crucial requirement is that the persons must all have the intention to commit the offence, ***in casu*** to murder and assist one another in committing the murder. Reference was made to the decisions in ***Philip Wagawaga Ngcamphalala and 7 Others v Rex***, Criminal Appeal Case No. 17/2002, and ***Nhlanhla Charles Mavatele and Another v Rex***, Appeal Case No. 11/2001.

[34] The 2nd Appellant submitted that in applying the doctrine of common purpose, the Court ***a quo*** was enjoined to analyze the role played by each accused person and thereafter determine if the Crown has established the ***mens rea*** of each participant. On the contrary, ***in casu*** the court ***a quo*** did not make any attempt to do so, but instead assessed the liability of all the accused ***en bloc.***

[35] It was also the contention of the 2nd Appellant that the court ***a quo*** failed to establish that the Appellant's active association in a joint unlawful venture with any person, and its conclusion should not be upheld.

[36] It was also submitted that the 2nd Appellant was not at the scene of murder as she was out of the country and nothing was found on her, the case against her was mainly circumstantial, and the evidence of PW8 was contradicted by that of PW3.

It was argued that there was no independent evidence implicating the 2nd Appellant except the evidence of the accomplice witness PW8. Under Section 237 of the Criminal Procedure and Evidence Act, the court ought to have accepted on the evidence of the accomplice witness with caution. However, the court ***a quo*** did not warn itself of the danger acting on accomplice evidence without corroboration. Reliance was placed on ***Hoffman and Zeffert – The South African Law of Evidence*** (4th Edition) page 38, ***Hawuza Maziya v. Rex,*** Criminal Appeal Case No. 23/1999.

[37] With regard to the complaint that the court ***a quo*** erred in not considering the defence, the 2nd Appellant submitted that although the 2nd Appellant attended the meeting where the plan to murder the deceased was made, the Appellant was not present when the murder was committed. More importantly, it was contended that the 2nd Appellant had maintained in court that she withdrew from the said plan, and there is no evidence indicating that her evidence was false beyond reasonable doubt. Moreover, she contended that her defence was put to Crown witnesses who failed to rebut her assertion.

Reference was made to decision in ***Obert Sthembiso Chikane*** **(Supra)** in support of the submission that the version of the accused can only not be accepted where it is found to be false beyond reasonable doubt, and that if it is reasonably possibly true then it should be accepted.

[38] With regard to the appeal against sentence, the 2nd Appellant submitted that it is impossible to discern from the record that the trial judge took into account mitigating factors in favour of the Appellant before imposing the sentence. It was the contention of the Appellant that the trial judge was content to consider only extenuating circumstances.

Reliance was made to the decision of ***Gidion Ponono Dlamini v. The King Criminal*** Appeal No. 20/1998, to support her submissions.

ARGUMENTS OF THE RESPONDENT

[39] The Respondent submitted that the trial judge did not err in law and in fact in relying on the evidence of accomplice witness (PW8) because he was credible.

It was the Respondent's contention that the issue of the evidence of accomplice witness was dealt with extensively by the trial judge in her judgment and she relied on the case of ***R v Ncanana (1948) S A 399.***

[40] The Respondent argued further that the speculation that PW8 heard the evidence in court before he was arrested had no basis as he was cross-examined at length and repeated everything in detail as he knew it. It was the contention of the Respondent that the trial judge analyzed all the evidence against each of the Appellant before she came to her findings.

[41] The Respondent further submitted that the issue of the PW8 not complaining about failure of the 1st Appellant to pay him could not help to prove whether the Appellant was guilty or not and therefore there was no misdirection by the trial judge in finding that this issue did not affect the credibility of PW8.

[42] With regard to the complaint that the trial judge did not consider the evidence of the 1st Appellant and DW3, the Respondent submitted that the trial judge referred to all evidence presented before the court before coming to her

decision.

[43] It was the submission of the Respondent that PW3's evidence corroborated the evidence of PW8 regarding the plan to kill the deceased. It was also contended that the medical evidence corroborated PW8's evidence regarding the injuries sustained by the deceased.

[44] The Respondent argued that the trial judge dealt with the contradictions between the evidence of PW8 and PW3 and held that they were not material, looking at the evidence as a whole.

[45] With regard to the issue of absence of common purpose, the Respondent submitted that it depended on circumstantial evidence since the 2nd Appellant was not present when the crime was committed. It was the Respondent's contention that once it is established that there was an agreement, the Crown must prove that each of the accused did something in furtherance of the common purpose.

[46] The Respondent argued that there was an agreement reached at a meeting called by the 2nd Appellant to kill the deceased. As part of the agreement, the 2nd Appellant promised to pay those hired to kill after they had accomplished their assignment. It was the submission of the Respondent that if promise to pay had not been made, PW8 and A1 could not have carried out the killing. The 2nd Appellant also assisted PW8 from being arrested by escaping to South Africa.

[47] Lastly, the Respondent submitted that at no point was PW8 indemnified before the conclusion of the trial. It was the contention of the Respondent that PW8 was indemnified when the judgment was delivered.

It was the submission of the Respondent that the court ***a quo*** ordered that PW8 awaits the court's decision as whether he was indemnified or not at home, and not in custody, as the Respondent had indicated that it was no longer going to prosecute him, pending the determination by the court as whether he was indemnified or not.

CONSIDERATION OF LAW AND GROUNDS OF APPEAL

[48] The Appellants have argued their grounds of appeal separately although the evidence is intertwined since it is based on a common purpose. However, every effort will be made to consider the case against each Appellant separately in as far as the liability of each of them is concerned.

[49] The main issues that arise out of the grounds of appeal are whether the trial judge erred in convicting the Appellants on the evidence of an accomplice witness or whether his evidence was credible and the trial judge addressed herself to the cautionary rule. The second issue is whether the prosecution proved common purpose in respect of both Appellants or whether the 2nd Appellant abandoned the plan to kill the deceased.

[50] The law relating to the acceptance of accomplice evidence is well settled. It springs from the provision of Section 237 of the Criminal Law and Procedure Act No. 67 of 1938 which provides for conviction on a single evidence of an accomplice as follows;

"237 Any court which is trying any person on a charge or any offence may convict him of any offence alleged against him in the indictment or summons on a 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 such court to have been actually committed."

[51] Several decisions have considered the above section and given some guidelines on its application. First, the court must find that the evidence of the accomplice witness is credible. Second, there must be independent evidence that the offence was actually committed. Third, there is a need in the Court to observe the cautionary rule.

[52] In ***Jabulane Mzila Dlamini and Another v.R*** Criminal Appeal Case No. 16/121, this court quoted with approval the case of ***S.V. Hlapezula*** 1965 (4) SA 439 (A) where the South African Appellate Division of the Supreme Court stated:

"It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self-confessed criminal. Second, various considerations may lead him to falsely implicate the accused, for example a desire to shield a culprit or particularly where he has not been sentenced, the hope of clemency.

Third, by reason of his inside knowledge, he has a deceptive facility for convincing description − his only fiction being the substitution of the accused for the culprit……. there has grown up a cautionary rule of practice requiring (a) recognition by the trial court of the foregoing dangers, and (b) the safeguard of some factor reducing the risk of a wrong conviction, such as corroboration implicating the accused in the commission of the offence, or the absence of gainsaying evidence from him, or his mendacity as a witness, or the implication by the accomplice of someone near or dear to him"

[53] In ***Linda Kibho Magongo v. The King*** Criminal Appeal No. 25/2010, this Court observed;

*"The judgment of this Court in **Motsa v Rex,** follows upon the decision of, among others, of Nathan CJ in **R v Mtetwa** where the learned Judge said at 367 B-C 1976 SLR 364 (HC) that:*

"This is accomplice evidence. In terms of s 237 of 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 that 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 pointed out by Hoffmann:South African Law of Evidence 2nd ed p. 399, corroboration implicating the accused still falls to be considered under the well known "cautionary rule".

[54] In ***R v Ncanana*** (1948) SA 399 A at pages 405 – 406 it was stated by Schreiner JA that:

"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 else 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 demirits of the latter are beyond question."

[55] In ***S.v. Masuku*** 1969 (2) S A 25 A 375 (N) at page 375 – 7 the following exposition of the basic principles relating to the evidence of an accomplice was given:

1. *Caution in dealing with evidence of an accomplice is imperative.*

2. *An accomplice is a witness with a possible motive to tell lies about an innocent accused, for example, to shield some other person or to obtain immunity for himself.*

3. *Corroboration, not implicating an accused but merely in regard to the details of the crime, not implicating the accused is not conclusive of the truthfulness of the accomplice.*

4. *The very fact of his being an accomplice enables him to furnish the court with details of the crime which is art to give the court the impression that he is in all respects a satisfactory witness or as he has been described able to convince the unwary that his lies are the truth.*

5. *Accordingly, to satisfy the cautionary rule, if corroboration is sought it must be corroboration directly implicating the accused in commission of the offence.*

6. *Such corroboration may, however, be found in the evidence of another accomplice provided the latter is a reliable witness.*

7. *Where there is no such corroboration there must be some other assurance that the evidence of the accomplice is reliable.*

8. *That assurance may be found where the accused is a lying witness or where he does not give evidence.*

9. *The risk of incrimination will also be reduced in a proper case where the accomplice is a friend of the accused.*

10. *Where the corroboration of an accomplice is offered by evidence of another accomplice the latter remains an accomplice and the court is not relieved of its duty to examine his evidence also with caution. He like the other accomplice has a possible motive to tell lies.*

11. In the absence of any of the aforesaid features, it is competent for a court to convict on the evidence of an accomplice only where the court understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance and rejection of the accused is only permissible where the merits of the accomplice as a witness and the merits of the accused as a witness are beyond question.

[56] How then did the trial judge in the court ***a quo*** deal with accomplice evidence? An accomplice is a person who takes part in the offence or who aids, abets or procures the commission of an offence. **In *casu*** both PW8 and PW3 were accomplices although the degree of their participation was different. While PW8 participated fully in the crime, PW3 abandoned the plan before the deceased was killed. The level of participation has an effect on the reliability of the witness.

[57] In the first ground of appeal, the 1st Appellant complained that the court ***a quo*** erred in relying entirely on the evidence of PW8 whose evidence was not credible because PW8's evidence was contradicted by the evidence of PW3 regarding the presence of the 1st Appellant at the initial meeting when a plan to kill the deceased was made, among other reason already expounded in the Appellant's arguments.

[58] In her judgment, the trial judge in the court ***a quo*** analysed all the evidence adduced at the trial before addressing four major issues, namely, whether there was a conspiracy between PW3, A1 and PW8 to kill the deceased, whether the accomplice witness was credible, whether the crime had been committed, and the doctrine of common purpose.

[59] The main evidence against the 1st Appellant was given by PW8, the accomplice witness. In this regard the trial judge stated:

> ***" [79] The defence has challenged the evidence of Mdluli saying that I should treat his evidence with caution. They say that because Mdluli was arrested long after the trial had commenced and was kept in custody for several months before he testified.***

He was clearly schooled by the police as to what his co-accused had said at the police station and also the results of cross-examination of Crown witnesses in court.

[80] That the evidence by Mdluli that Accused 2 telephoned Accused 3 in his presence and the conversation that took place did not come from statements of his co-accused at the police station nor as a result of cross-examination of Crown witnesses. That the evidence of how the deceased was killed did not come from the co-accused nor as a result of cross-examination of the Crown witnesses. In my considered view the details of the evidence surrounding the killing of the deceased is very authentic and even the police could not have schooled Mdluli in such a detailed manner.

[81] Generally, it is true that courts have to treat the evidence of an accomplice witness with caution. As he or she may have personal reasons for implicating the Accused."

[60] The trial judge referred to several cases dealing with accomplice evidence including; ***S v Hlabezula*** 1965 (4) SA 439 (A) ***R v Mandla Homeboy Dlamini*** 1982 – 1986 S L R 387, ***Jabulane Mzila Dlamini and Another v R,*** (Supra) ***Linda Kibho Magongo v The King*** (Supra) and ***R v Ncanana*** (1948) S A 399 A.

[61] The trial judge in her comprehensive judgment addressed in detail every argument raised against the credibility of PW8. The trial judge observed:

> ***"[87] It was argued on behalf of Accused 2 who was first implicated by PW3 that the latter's credibility was shaken as he lied in court that Accused 3 was not his friend and that Accused 3 was not present when the plan was hatched and yet under cross-examination it transpired that they were friends.***
>
> ***[88] It was further argued that Mdluli contradicted the testimony of PW3 when giving evidence pertaining to the planning stage as he said that Accused 3 was present.***

[89] ***In my considered view these apparent contractions are not material when one looks at the totality of the evidence. Mr. Manana further argued that there is an indication that Accused 2 is being falsely implicated in this case by the witnesses for their own personal reasons and that Mdluli is getting back at Accused 2 for allegedly having abandoned him in South Africa and for shifting the blame on him.***

[90] ***I do not agree with Mr. Manana. Accused 2 was not falsely implicated as she is the initiator of the plan to have the deceased killed for bewitching her.***

[91] ***Equally it has been argued on behalf of Accused 3 that Mdluli was not a credible witness because he told the court that he had been hired by Accused 2 to kill the deceased because he was bewitching her and then claimed that Accused 3 also offered him some money to kill the deceased. As far as I am concerned there is no contradiction here because Accused 2 offered to pay E1, 000.00, Accused 3 would pay another E1,000.00 and another relative would pay another E1,000.00***

[92] ***It was further argued on behalf of Accused 3, that Mdluli testified that he struck the deceased first and Accused 3 finished him off. Mr. Dlamini wondered why Accused 3 would hire Mdluli and then participate in the killing himself. The answer is Mdluli panicked when the deceased failed to die.***

[93] ***Mr. Dlamini further submitted that Mdluli never demanded payment from Accused 3 which fact would suggest that Accused 3 was never involved. It is possible that Mdluli never demanded payment because Accused 3 ultimately participated in the killing of the deceased.***

According to the admissions put by Mr. Manana to PW3, Accused 3 introduced PW3 to Accused 2 as the person he had found to kill the deceased after lightning failed and that Accused 3 would pay him as Accused 2 had no money. Accused 3 is alleged to have telephoned Accused 2 and told her that he had secured the services of Mdluli. Mdluli also testified that at a meeting during December 2009, Accused 3 was present wherein Accused 2 requested PW3 and Accused 3 to kill the deceased.

[94] For the foregoing reasons it has been urged upon me that it would be unsafe to convict Accused 3. I believe the evidence of Mdluli and any inconsistencies and improbabilities are not so material as to make me reject his evidence."

[62] It should be recalled that the 1st Appellant was A3 at the trial, and the 2nd Appellant was A2 at the trial. PW8 (Mdluli) was A1 at the trial.

[63] I am unable to fault the trial judge in making the above findings on the credibility of PW8. The trial judge gave reasons for coming to those findings and in my view they were supported by the evidence on record.

[64] PW8 gave very detailed evidence of the plan to kill the deceased from the initial meeting where the plan was made, to the subsequent developments in the plan and the eventual execution of the plan, and his active participation in the plan to the end. It was argued that the Police schooled him in the evidence but the Police could not have obtained the details from anyone else except PW8 as regards the killing of the deceased. It was also submitted that PW8 implicated the Appellants to exonerate himself from prosecution, but why did he have to implicate the 1st Appellant and leave out PW3?

It is now common ground that the 2nd Appellant was the initiator of the plan, although she now argues that she divorced herself from the plan. Moreover PW8 was related to both Appellants and did not have any grudges or motive to implicate them falsely.

[65] The trial judge addressed herself to the cautionary rule as stated in the case ***S.v Masuku and Another*** 1962 (2) SA 375 and held that under Section 237 of the Criminal Procedure and Evidence Act No. 67 of 1938, the court was entitled to convict the Appellant on the single evidence of an accomplice, provided that it has been proved to the satisfaction of the court that the offence has been actually committed .

She held further that the unlawful death of the deceased had been proved and there was never any challenge by way of the Appellants that the deceased was not murdered. I agree. Therefore the first ground of appeal must fail.

[66] In the second ground of appeal, the 1st Appellant complained that the trial judge did not consider his evidence nor that of his witness DW3.

As indicated earlier, the Appellant did not elaborate on this ground in his heads of argument but submitted that he had no reason to kill the deceased and would go to South Africa to collect money for fees.

[67] This criticism of the court ***a quo*** has no merit. The trial judge examined in detail the evidence of the 1st Appellant and his witness DW3. It is necessary to quote part of the Appellant's evidence as stated by the trial judge:

> ***"[50] Accused 3 next gave evidence. He testified that on the 23rd January 2010 he returned to Ngelane from South Africa. That night he slept with his girlfriend Nompumelelo at the Masuku home. He did not proceed to his home because it was late. He says that at around 4.00 a.m. PW8 arrived and informed him that he had come to kill the deceased. After that revelation PW8 disappeared and returned some twenty or thirty minutes later to inform him that he had tried to kill the deceased but that he was not dying. He says that Nompumelelo heard this conversation.***

He told PW8 to leave. After PW8 left he and Nompumelelo went back to sleep. In the morning he heard someone raise an alarm and PW6 came to fetch Nompumelelo and together they went to investigate what was happening.

[51] When Nompumelelo returned she informed him that the deceased had been found dead. He went to the scene and indeed found the deceased dead. PW8 also joined them at the scene. Someone telephoned the police who came and removed the deceased. He says that the relationship between him and the deceased was fine. After the funeral he returned to South Africa. He returned home during March 2010 as he heard that the police were looking for him in connection with the death of the deceased. On the 1st April 2010, the police arrested him together with PW3, PW4 and Nompumelelo. Accused 2 was already at the police station."

[68] The trial judge also considered the evidence of PW3 who in effect supported the evidence of the 1st Appellant regarding his spending the material night in her house.

[69] The evidence of the 1st Appellant raises questions as to why he came back that same night, and decided to spend the night near the home of the deceased. Why did PW8 come to his house at night to tell him how he was going to kill the deceased and how the deceased was not dying? He claims that he told PW8 to leave his house and he went to sleep. This admission that PW8 went to his house that night and told him about killing the deceased is a highly incriminating piece of evidence showing that the 1st Appellant was a participant in the plan to kill the deceased. His evidence did not exonerate him, but instead incriminated him in the crime. Therefore the 2nd ground of appeal has no merit.

[70] In the third ground of appeal, the 1st Appellant submitted that the trial judge erred in discharging PW8 upon the conclusion of his evidence before the end of the trial. It was argued that this premature discharge gave the impression that the court had already found the accomplice witness credible.

[71] Section 234 of Criminal Procedure and Evidence Act No. 67 of 1938 provides as follows;

"(1) If any person who to the knowledge of the public prosecutor has been an accomplice, either as principal or accessory, in the commission of any offence alleged in any indictment or summons, or the subject of a preparatory examination, is produced as a witness by and on behalf of such public prosecutor and submits to be sworn as a witness, and fully answers to the satisfaction of the court or magistrate all lawful questions put to him while under examination, he shall thereby be absolutely freed and discharged from all liability to prosecution for such offence, either at the public instance or at the instance of any private party; or when he has been produced as a witness by an on behalf of any private prosecutor who is aware of such person's complicity, from all prosecution for such offence at the instance of any such private prosecutor.

(2) The said court or magistrate shall thereupon cause such discharge to be duly entered on the record of the proceedings:

Provided that such discharge shall be of no force and effect and the entry thereof on the record of such proceedings shall be deleted if, when called as a witness at a re-opening of the preparatory examination or at the trial of any person upon a charge of having committed such offence, the person in respect of whom such discharge was made fails to submit to be sworn as a witness or fully to answer, to the satisfaction of the magistrate holding such preparatory examination or of the court trying such charge, all such question put to him while under examination as a witness."

[72] The 1st Appellant relied on the case of ***Nico Ledube and Nyamana v State*** Case No.43/88 where the South African Appellate Division of the Supreme Court stated;

"In my view it amounts to an irregularity for a court to grant a witness a discharge from prosecution in terms of Sec 204(2) before the conclusion of the case. Before such discharge may be granted the

court is required to be of the opinion that the witness has answered frankly and honestly all questions that have been put to him.

This involves an assessment of the witness's evidence and a decision by the court that the witness has been frank and honest. A witness may of course be honest, but mistaken. However, a finding that he has been honest is fundamental in regard to the ultimate determination of the witness's credibility. The making of a finding such as this before hearing the rest of the evidence, precludes the court, for the purpose of this finding, from comparing such witness's evidence with that of others who might be called to testify in regard to the same facts.

Ultimately the court has to determine whether, on all the evidence, a conviction of the accused is justified.

By granting a discharge to an accomplice at the completion of his evidence, the court not only gives the wrong impression to the accused who might feel that the court is prejudging the issue, but granting a discharge at that early stage without a proper evaluation of the witness's evidence in light of all the other evidence that might be adduced, could well have a detrimental effect on the court's own thinking.

The fact that the Act makes no provision for the withdrawal of a discharge, once it has been granted by the court, is an indication that it was not contemplated that it should be given until the end of the case."

[73] The Respondent submitted that PW8 was not indemnified before the conclusion of the trial, but when the trial judge gave judgment. The court ***a quo*** merely ordered PW8 to go home and await the decision of the court regarding his indemnification.

[74] It is clear from the record of proceedings that PW8 was not discharged after giving evidence, but when the trial judge gave her judgment and stated, "PW8 is hereby indemnified from prosecution". Therefore this ground of appeal must fail.

[75] Consequently, I find no merit in the appeal by the 1st Appellant which should be dismissed.

[76] The main issues raised in the appeal by the 2nd Appellant are whether the 2nd Appellant had a common purpose with her co-accused when the murder was committed, and whether the 2nd Appellant divorced herself from the plan to kill the deceased.

[77] It is necessary first to deal with the doctrine of common purpose. In the case of ***Thomas v. S 2003 (6) S A 505***, the court defined the doctrine of common purpose as follows;

> "***The doctrine of common purpose is a set of rules of common law that regulates the attribution of criminal liability to a person who undertakes jointly with another person or persons, the commission of a crime. Burchell and Milton defines the doctrine of common purpose in the following words:***
>
> > ***"Where two or more people agree to commit crime or actively associate in a joint unlawful enterprise, each will be responsible for the specific criminal conduct committed by one of their number which falls within the common design. Liability arises from their common purpose to commit the crime"***

[78] The 2nd Appellant submitted that the trial judge did not analyse the role played by each accused and thereafter determine whether each had ***mens rea,*** but she instead took what might be described as a blanket or global approach. The Appellant also argued that she did not actively participate in the crime as she was not present during the killing of the deceased and yet the court ***a quo*** found that she had actively participated in the furtherance of a common purpose. The Appellant further contended that the trial judge erroneously shifted the onus on the Appellant to prove her innocence, although the Appellant did not point out where in the judgment, the shifting of the proof took place.

[79] In her judgment, the trial judge addressed herself on the doctrine of common purpose as follows:

> "*The doctrine of common purpose states that the co-accused are liable because they participated in the killing of the deceased with the necessary* ***mens rea****; in other words they are accomplices or co-perpetrators* ***(socii criminis)*** *and their liability falls to be decided on the usual common law principles relating to* ***actus reus*** *and* ***mens rea.*** *See Burchell and Hunt Vol 1, General Principles of Law."*

[80] The trial judge then considered whether there was a conspiracy between the Appellants to kill the deceased. After analysing the evidence of the prosecution witnesses and the defence of the Appellant, the trial judge came to the following conclusion;

> "*[73*] ***I am satisfied and the evidence shows that there was indeed a conspiracy to kill the deceased. However, when Accused 2 gave evidence she denied that she initiated the plot to kill the deceased and that she had promised to pay PW3 and PW8. Instead she said that she had a good relationship with the deceased and had no reason to kill him. She did not even allude to the admissions made on her behalf by her attorney nor did she deny these or that she had changed her mind about having the deceased killed.***
>
> ***[74] Swazi Mdluli also corroborated the story that there was a meeting during December 2009 wherein the death of the deceased was planned. The meeting was attended by Accused 2, Accused 3 and PW3.***

He says that Accused 2 requested PW3 and Accused 3 to kill the deceased and she would pay them E40,000.00 (Forty thousand Emalangeni). However the plan was abandoned because Accused 2 failed to provide the money that she had promised them.

[75] Swazi Mdluli testified that Accused 2 never abandoned the plan to have the deceased killed. He says that during early January 2010, Accused 2 telephoned Accused 3 from South Africa where she was residing. Mdluli was also present. Accused 2 reminded Accused 3 of their plan to kill the deceased. She said that they should go ahead and she would pay Mdluli E1000 and Accused 3 would pay Mdluli another E1000and another unnamed relative would pay Mdlluli an additional E1000 bringing the total to E 3000

[76] I am satisfied that the plan to kill the deceased was never abandoned by Accused 2"

[81] I am unable to fault the trial judge in her findings that the 2nd Appellant was the initiator of the plan to kill the deceased, and she is the one who promised to pay the would be killers after they had carried out the task. It is possible that the plan seemed abandoned for some time on account of the 2nd Appellant not having the money, but it was later revived and the killers engaged. The evidence of PW8 confirms this active participation in the plan to kill the deceased and the plan was accomplished. Indeed the 2nd Appellant returned from South Africa the same morning the deceased was killed.

[82] An important matter to consider is why the 2nd Appellant at first in her evidence denied having participated in the conspiracy to kill the deceased but later in the trial, she admitted having done so but later divorced herself from the plan. Was she entitled to be believed in her defence? PW3 abandoned the plan and straight away admitted his role in the initial planning. Why did the 2nd Appellant not do the same if she was innocent? She cannot blame the court ***a quo*** for shifting the burden of proof on her because she is the one who raised the defence of abandoning the plan. In my view the court ***a quo*** was justified in rejecting her defence.

[83] In the result the appeal by the 2nd Appellant against conviction must also fail.

[84] The 2nd Appellant also appealed against her sentence on the ground that it was excessive taking into account the fact that she did not take an active role in the commission of the offence. This assertion is misplaced because the Appellant was the prime mover of the conspiracy who promised to finance it to achieve her own interests. Therefore she played a major role because the deceased would not have been killed if she had not actively participated in the plan.

[85] Sentencing is in the primacy discretion of a trial court and an appellate court will not interfere with the sentence imposed unless it was based on a wrong principle or was extremely excessive as to amount to a miscarriage of justice.

[86] In the present case, a sentence of Fifteen (15) years imposed was within the range of sentences imposed for similar offences for which the Appellant was convicted. Therefore this court has no reason to interfere with the sentence imposed. The appeal against sentence must fail.

[87] Accordingly the appeal by the 2nd Appellant is dismissed.

[88] In the result the order of the court is;

1. ***That the appeal by the 1st Appellant is dismissed.***

2. ***That the appeal by the 2nd Appellant is dismissed.***

DR. B.J ODOKI
JUSTICE OF APPEAL

I agree **S.B. MAPHALALA**
JUSTICE OF APPEAL

I agree **J.P. ANNANDALE**
JUSTICE OF APPEAL

FOR THE 1st APPELLANT: **M.B. DLAMINI**
FOR THE 2ND APPELLANT: **M. MABILA**
FOR THE RESPONDENT: **M. NXUMALO**