252/79
N.v.H.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

VUSI MANDLA DLADLA — Appellant

and

THE STATE — Respondent

Coram: TROLLIP, CORBETT, et MILLER, JJA

Heard: 5 November 1979

Delivered: 14 November 1979

J U D G M E N T

MILLER, JA :-

The appellant, together with two others, stood trial in the Durban and Coast Local Division on a charge of murder. He was convicted and no extenuating circumstances having been found, he was sentenced to death.

His/.....

His application for leave to appeal against the conviction and sentence was refused and he thereupon, successfully, petitioned the Chief Justice for such leave. The appeal was heard on 5 November. After conclusion of argument the Court made an order allowing the appeal and setting aside the conviction and sentence and intimated that reasons for the order would later be filed. Those reasons now follow.

The appellant was No 3 accused at the trial. No 1 accused will herein be referred to as Khanyile and No 2 as Mkhize. At the commencement of the proceedings held in terms of sect 119 of Act 51 of 1977, the record of which was handed in at the trial, the appellant and Mkhize pleaded not guilty. Khanyile pleaded in these terms:- "I plead not guilty but I did not have the intention to kill het, but I killed her." (The "her" thus referred to

was the deceased woman, Daphne Mlambo, named in the in=dictment.) After the Magistrate had carefully explained to him that he was not obliged to make admissions and that he was to consider whether he wanted to admit that he had killed the deceased, Khanyile said that he did not "kill her with my hands" but that "(I)t was in fact accused No 3 who killed her". Khanyile thereupon, in answer to a question by the Magistrate, gave a fairly detailed account of the events which culminated in the killing of the deceased. Mkhize and the appellant made brief statements to indicate the nature of their defences and the Magistrate thereafter entered a plea of not guilty in respect of each of the three accused persons. Upon closure of the State case in the Court a quo, Mkhize's counsel successfully applied for the discharge of his client. Thereafter both Khanyile and the appellant gave evidence. Neither called any other witness. The result of the trial in respect of the appellant has already been disclosed. Khanyile was also

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found guilty of murdering the deceased but in his case extenuating circumstances were found and he was sentenced to twelve years imprisonment, of which four years were conditionally suspended. He was not a party to this appeal.

It appears from the evidence that Khanyile and the deceased were lovers but that at the time with which we are concerned, Khanyile was annoyed with her because he knew or believed that she had acquired a new lover. During the night of 28 July 1978 the deceased was in the room of the witness Jane Duma, who was her friend. Jane's boy friend was also in the room. According to Jane, whose evidence was accepted by the Court a quo, they were disturbed by the noise of knocking on the door and against the window of the room. She opened the door and a man whom she had never seen before entered the room, holding aloft a knife. Khanyile and Mkhize, both of

whom/.....

whom were known to Jane, followed him into the room. Jane expressed the opinion that the appellant was the man with the knife, although she admitted that she was not quite sure. Khanyile testified that the appellant was that man and the appellant himself admitted that he entered the room that evening with Khanyile, but denied that he carried a knife. Jane's evidence was to the further effect that the man with the knife was aggressive in manner and in deed. He threatened to report to Jane's employer that she was harbouring a "thug" in her room (referring to Jane's boy friend who he apparently thought was deceased's new lover) and while still holding the open knife in his hand he slapped the deceased's face, but without injuring her with the knife, and exhorted her to come away with them. The deceased, who had been sleeping, then said she would come away peace= fully, which she did. She, together with the three young men who had entered the room, then departed. At some later stage, but apparently not before 8th August, Jane reported to the

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police that the deceased, whom she had not seen since the night of 28th July, had been "kidnapped" from her room and she laid a charge to that effect against the appellant.

In the course of investigating the complaint made by Jane, detective sergeant Ngidi interviewed Mkhize. What resulted from that interview was that on 12th August Mkhize led Ngidi to a spot in fairly dense bush, not very far from the room occupied by Jane Duma in Garbutt Road, Durban. According to Ngidi, it would be about a ten-minute walk from Jane's room to the place in the bush. At a spot in the bush pointed out by Mkhize, the largely decomposed body of the deceased was found. The head had been severed from the body and was found concealed in thick bushes about 25 paces from the body. Dr Asmal, who examined the body and the head on 14th August, found himself unable to say whether the severance of the head from the body occurred after death or was the very cause of death. Nor

could he say whether the deceased had suffered any other injuries or wounds, whether resulting from stabbing or from any other form of assault. The degree of decompo= sition of the body was too great to permit of the expression of any opinion in that regard.

Before giving evidence at the trial Khanyile made no fewer than three statements to different persons concerning the killing of the deceased. I have already mentioned the statement he made to the Magistrate who presided over the sect 119 proceedings. On the day follow= ing the making of that statement, on 25th August, he made a detailed statement to another Magistrate which was recorded and produced in evidence. But prior to both those state= ments he had confided in a friend, Sokhulu, who at the trial was called as a witness by the State. Sokhulu said that on 29th July (he actually said 29th August but it is clear, as the Court a quo also found, that he was referring

to 29th July) he, Khanyile and Mkhize went to a party. Khanyile called him aside and told him that "he had killed". At first Sokhulu did not believe him and accused him of "playing the fool" but Khanyile persisted in saying that he had killed and in answer to questions by Sokhulu said that the person he had killed was his, Khanyile's, girl friend. He declined to say why he had killed her but gave a brief description of how she was killed. In Sokhulu's words at the trial

> "He said they cut off her head, they threw the body to one side and the head to the other. And he told me that they dumped the body in some bushes. He did not tell me who the others were."

The reference to "they", whereas initially Sokhulu had said that Khanyile told him that it was "he" who had killed the girl, understandably provoked much questioning. In essence,

Sokhulu's explanation, from which he at no time departed, was that after Khanyile had spoken to him he was left in no doubt that what Khanyile told him was that he, Khanyile, had killed the girl and that others had been with him when the head was cut off. It was directly put to him by Khanyile's counsel that Khanyile would say that he told him not that he killed the girl but that the appellant killed her. Sokhulu denied this and said that Khanyile made it clear to him "that he (Khanyile) is the one that did the killing". This evidence is of considerable importance because appellant's evidence, consistently with what he had said at the sect 119 proceedings and in a statement made to the police on 28th August was in effect that after he, the deceased and Khanyile left Jane Duma's room on the night in question he went off on his own, leaving the others to go their way and that he knew nothing about the killing of the deceased. Khanyile's evidence at the trial, however,

was that the deceased was attacked and killed by the appellant, who also cut off her head, and that he, Khanyile, played but a small role, administering a trivial or minor injury to the deceased with a knife, after she had died, and that only because the appellant, whom he feared, ordered him to injure her. He also said that he and Mkhize, upon appellant's instructions, carried the deceased's body and put it in the bushes. I have given merely a very brief resumé of Khanyile's evidence in chief relating directly to the killing of the deceased. His evidence at the trial was in many respects (some of minor importance but others of real significance) different from what he had said in one or more of his previous statements. It will be necessary in due course to mention more specifically only some of the major inconsistencies.

The trial Court accepted the evidence of Jane Duma and rejected as false the appellant's evidence that

he did not carry or brandish a knife or assault the deceased in Jane's room. There is no justification for interference with that finding, which must stand. As to what happened after the deceased left the room with those who had apparent= ly come to fetch her, the learned trial Judge, in his judgment, recognized that the only direct testimony linking the appel= lant with the actual killing of the deceased was that of Khanyile; that it was necessary to approach Khanyile's evidence "with the greatest degree of caution and circum= spection" since he could have "a positive motive to incriminate accused No 3 (appellant) falsely in an attempt to minimise his own responsibility"; that if it was reasonably possible that appellant's evidence might be true he could not properly be convicted. In that context the learned Judge added, with reference to Khanyile:-

> "His evidence, or a very material part thereof at least, nevertheless receives support from the evidence of Mary Jane Duma. His description of what happened at Mary Duma's house is in almost perfect accord with her evidence in that

> regard. Apart from slight deviations, which are immaterial, he receives full corroboration from her about the incidents at her house."

Concerning the evidence of Sokhulu, the learned Judge mentioned that it "becomes of some importance when the Court has to weigh the evidence of accused No 1 (Khanyile) against the evidence of accused No 3". He concluded that although Sokhulu appeared to be a credible witness concerning whose demeanour no adverse comment could be made, it could not be found as a fact that Khanyile told him that he alone had killed the deceased, because Sokhulu himself appeared to be uncertain whether that was what Khanyile conveyed to him or whether he conveyed that he together with others (appellant and Mkhize) had killed her. It would appear that in the light of that finding the trial Court did not take into account Sokhulu's evidence when finally resolving the issue of credibility between Khanyile and the appellant.

Concerning/.....

Concerning that vital issue the learned Judge, in an earlier part of the judgment, said this:-

> "Let me say immediately that both of them made an equally bad impression as a witness. The Court was not impressed with the way in which either of them testified."

After some reference, in general terms, to the evasiveness of both these witnesses and to other shortcomings in them, the judgment proceeds:-

> "If we compare (them) as witnesses, the Court's view is nevertheless that accused No 1 was a slightly better witness than accused No 3."

And ultimately, after referring in detail to what it regarded as unsatisfactory features of the appellant's evidence, and to the probabilities, the Court a quo concluded that the appellant was "an absolute and thorough

liar/.....

liar" whose evidence it had "no hesitancy in rejecting". An important part of the Court's reasoning in coming to that conclusion is reflected in the following extract from the judgment() (the "Mary" or "Mary Duma" referred to by the trial Judge, is, of course, the person I refer to, throughout, as Jane Duma or simply as Jane):

> "The Court has no hesitation in accepting the evidence of accused No 1 and of Mary Duma in relation to what happened in Mary's room. Proceeding from that premise, one may then examine the rest of accused No 3's evidence, bearing in mind that in Mary's room he was the person who played the active part while accused No 1 and accused No 2 were passive bystanders. If his evidence is correct that No 1 merely asked him to accompany him to fetch his girl friend, why, the Court asks itself, did he, accused No 3, turn violent in that room? Why did he take the leading part there? Why did he enter that room armed with a knife? Why did he threaten Mary's boy friend with that knife? Why did he want to make absolutely sure that he was unknown to that boy friend before he proceeded to assault the deceased in the room?

Why, after all, did he assault her at all? There is no answer to all those questions. It is obvious that the probabilities lie with accused No 1's version, which is that before they had gone to Mary's room they had already formed the plan to fetch the deceased and kill her. I should also, of course, say that the Court finds it highly unlikely that accused No 3 would have done what the Court has just said he did in Mary's room and then go off to bed. It appears to me to be obvious that his evidence that he left accused No 1 and the deceased and went home and to bed, cannot be true. Again the probability is that, as No 1 said, the two of them went with the deceased to the bushy area where she was eventually killed."

Although Khanyile was not an accomplice called by the State, but a co-accused testifying in his own defence, the cautionary rule as enunciated by Schreiner, JA, in R v Ncanana, 1948 (4) SA 399 (A) at pp 405 - 6 is of full appli= cation to a witness in the position of Khanyile. A conten= tion that the rule is applicable only where the "accomplice

witness" is called by the State has been rejected by this Court. (Johannes v S 23 March 1979 (AD), not reported); and see Hoffman, The SA Law of Evidence 2nd Ed p 269 and cf. R v Nhleko 1960 (4) SA 712 (A) at p 722.) As Cross (Evidence 4th Ed p 175) observes in relation to a passage in the opinion of Lord Simonds, LC, in Davies v The Director of Public Prosecutions (1954) 1 ALL ER at p 513:

> "It will be observed that the passage which has just been quoted refers to an accomplice giving evidence on behalf of the prosecution. One of two co-prisoners may incriminate the other when giving evidence on his own behalf. On principle there does not appear to be any good reason for distinguishing the case in which an accomplice gives evidence on his own behalf from that in which he testifies on behalf of the prosecution."

Indeed, in some cases the circumstances may be such as to show that the risk involved in acting upon the evidence of one accused against his co-accused is of a particularly high degree, especially where there are actual indications of

attempts by or of a tendency in an accused to take advantage of the opportunity which the situation affords him of trying to save his own skin at the cost of his co-accused. For the reasons which follow I consider that this is such a case.

It is reasonably clear from the evidence that it was on Khanyile's initiative that Jane Duma's room was visited on the night in question. It was his object to fetch the deceased from the room and on his own admission he was angry with her because of her actual or believed infidelity. It appears that the appellant accompanied Khanyile at the latter's invitation. In none of his pre-trial statements did Khanyile say that appellant, too, was deceased's lover and was therefore also angry with her because of her taking a new lover. It was only at the trial that he first made such an assertion. Appellant said in chief that he had never been the deceased's lover.

He was not cross-examined on that aspect by counsel for Khanyile, nor was he questioned thereon by the trial Judge who asked him many questions on several aspects of his evidence. And in the course of lengthy cross-examination of appellant by Counsel for the State, the solitary question put to appellant on that aspect of the case was whether he had told Khanyile that he and deceased were lovers, to which he replied "no", adding that they had never been lovers. It is highly probable that Khanyile made that assertion with the object of creating and bestowing upon the appellant a motive for brutally murdering the deceased. If the appellant and the deceased were at no time lovers, there is nothing whatever to suggest that he had any motive or reason for killing the deceased. His conduct in the room is explicable upon the simple ground that having consented to accompany and assist Khanyile in getting the deceased away from the room he acted aggressively and in hectoring fashion to bring about the desired result. It is not without significance that despite his roughness in the room, he did not injure

the deceased. If he went to the room merely to assist Khanyile in getting the deceased away (which is not only possible but likely, having regard to the evidence as a whole) and if he had no interest in the deceased, nor any reason for killing her, never having been involved with her (which is also likely on the evidence) his explanation that after he had achieved the purpose for which Khanyile had asked him to accompany him he left the others and went about his own affairs, is by no means inherently improbable. The probability that Khanyile sought falsely to pin a motive for the murder onto the appellant illustrates the magnitude of the risk involved in acceptance of his evidence concerning the actual killing.

But there are further significant factors which underline that risk. Khanyile initially pleaded guilty, in the sect 119 proceedings, to the charge of murder - he would surely not have done so if he had merely, upon the instructions of appellant, inflicted a trivial knife wound

upon the already dead woman, as he testified at the trial. Nor would he have told Sokhulu, on the day following the killing, that it was he who killed her. Even if there was justification for the trial Court's finding that Sokhulu was not quite certain whether Khanyile said that "he" or "they" killed her, what emerges clearly from Sokhulu's evidence is that Khanyile did not tell him that it was appellant alone who killed her and cut off her head, as he testified at the trial. He would surely have told Sokhulu that, if it had happened.

As I have mentioned earlier in general terms, there are major inconsistencies in the several accounts given at different times by Khanyile of the events of that night. It is necessary to be more specific in regard to some of them and more particularly to those which illustrate his transference of previously admitted blame, in certain respects, from himself to the appellant. Whereas he had

conveyed to Sokhulu that he played, at the very least, an important part in the killing and, on 25th August, he had made a statement to a Magistrate in which he said that he was so angry with the deceased that he went to fetch her from Jane's room because he "wanted to stab her", his evidence in chief at the trial was to the effect that it was not he but appellant who suggested that they go to fetch the deceased and who asked him to lead the way to where she was. And, in the same statement to the Magistrate, he said that he and appellant agreed, prior to going to Jane's room, to kill the deceased and that when they had fetched the deceased and reached the bush, the appellant stabbed her "near the right clavicle", that she fell to the ground and that he, Khanyile, then took out his knife and stabbed her "on the right side of the abdomen, near the ribs". This is at significant variance with his later account at the sect 119 proceedings, repeated in his evidence in chief at the trial, that all that he did was

to inflict a trivial wound on the deceased's right side after she had died, by pulling a knife over her skin, taking care not to stab her or cause the knife to penetrate her. This was done, he said, because appellant of whom he stood in great fear, ordered him to stab or injure her and handed him his (the appellant's) knife for that purpose. (Khanyile claimed in evidence that he did not have a knife with him but it is to be noted that he had previously said, in his statement to the Magistrate, that he "took out" a knife and stabbed the deceased.) Under cross-examination he explained that what he had told the Magistrate on 25th August was not true; but later, when under pressure of persistent cross-examination by Counsel for the State, he appears to have attempted to reach a compromise between what he had told the Magistrate and what he had said in his evidence in chief.

The trial Court was not blind to these and other very serious defects in the evidence of Khanyile. Nor did it fail to take heed of the fact that he was a person with

"a positive motive to incriminate the appellant and minimise his own responsibility". As appears from extracts from the judgment quoted earlier herein, the Court a quo formed a very unfavourable impression of him as a witness, as it did of appellant, though it considered that Khanyile was the "slightly better witness" of the two. Nevertheless, the Court convicted the appellant and it would appear from consideration of the judgment as a whole that the main grounds for the conviction were (a) the substantial corroboration by Jane Duma of Khanyile's evidence of what happened in the room, (b) the circumstance that appellant was shown to have been untruthful in that respect, (c) the conclusion apparently reached by the Court a quo that there was no reasonable explanation, consistent with his evidence or his innocence, of his animosity towards and his violence against the deceased in Jane Duma's room, (d) that there were improbabilities in appellant's evidence, most notably in the respects that he claimed to have left

the others and gone off on his own after leaving Jane's room and that he claimed that he knew nothing about the death of the deceased, and asked Khanyile the next morning, for what the Court a quo considered was no good reason, where the deceased was. The Court a quo also attached importance to what it referred to as "contradictions and inconsistencies" in his evidence, to his ability "glibly to improvise", to the circumstance that not Khanyile but the appellant was the first to enter Jane Duma's room and, generally, to a tendency in the appellant to be evasive.

The events in Jane's room and the appellant's lack of candour in respect thereof were, of course, factors which it was proper for the Court a quo to have taken into account. But the vital question is whether, having regard to the patent and most serious weaknesses and inconsistencies in the evidence of Khanyile, who was the only witness who implicated the appellant in the actual killing of the deceased, it could reasonably be concluded that the charge

against the appellant was established beyond reasonable doubt? In Ncanana's case, ibid, it was recognized by Schreiner, JA, that although the risk attaching to accomplice evidence would best and most effectively be reduced by corroboration implicating the accused in the crime, it could also be effectively reduced if the accused failed to give evidence to contradict or explain that of the accomplice or if the accused was shown to be a lying witness. But this necessarily presupposes that the evidence of the accomplice implicating the accused is at least worthy of belief. As Schreiner, JA, pointed out (at p 406), acceptance of the accomplice's evidence and rejection of the accused's is permissible only "where the merits of the former and the demerits of the latter are beyond question". (See also per Ogilvie Thompson, JA, in R v Ngamtweni and Another 1959 (1) SA 894 at pp 897 H - 898 D.) Where a witness who is also an accused on trial not only makes a very poor impression on the Court and gives

evidence which is singularly lacking in consistency and quality, but also appears to be a witness prone to exonera= ting himself or minimizing his own responsibility at the expense of his co-accused to whom he assigns a progressively greater part in the crime and whom he, virtually at the eleventh hour, seeks to endow with what is in all probability a false motive for the murder charged, it appears to me that corroboration of such a witness in a respect not implicating his co-accused in the crime, does not cognizably reduce the risk. Nor is it effectively reduced in such circumstances by the added factor that such witness' co-accused was untruth= ful in certain collateral respects and was also a poor witness whose evidence in certain respects might appear to be impro= bable.

Counsel for the State emphasized in argument before us that if appellant were innocent he would not have denied that he behaved aggressively and assaulted the deceased

in Jane Duma's room. The fact that he lied in that respect was, he contended, of considerable importance and pointed strongly to his guilt. That the appellant's untruthfulness in this respect is a relevant factor, I have already accepted, but I cannot agree that in the context of this case it is of such significance or has such serious implications as Counsel suggested. That an innocent person may falsely deny certain facts because he fears that to admit them would be to imperil himself, is well-known and has often been recognized by the Courts. (Cf. R v Nel 1937 CPD 327; R v Du Plessis, 1944 AD 314 at p 323; R v Gani 1958 (1) SA 102 (A) at p 113 B - F; S v Letsoko and Others 1964 (4) SA 768 (A) at p 776.) The warning in those cases against the drawing of a possibly erroneous inference from the circumstance that an accused person lied in certain respects or performed some other act which raises suspicion of his guilt, ought to have been specially heeded in the circumstances of this case. It

appears to me that the appellant's false denial relating to what he said and did in Jane Duma's room is neither by itself nor when considered together with all the other circumstances upon which the Court a quo relied, of sufficient weight to tip the scales against him; scales upon which the vacillating, contradictory and substantially unreliable evidence of Khanyile weighs very light indeed. I might repeat that, for the reason already mentioned, the appellant's evidence that he went his own way after leaving Jane's room is not of itself improbable nor incompatible with acceptance of Jane's evidence of what happened in the room. Nor do I find it improbable that on the following morning he asked Khanyile where the deceased was, or that he could have had no good reason for asking that question. If he left Khanyile and the deceased soon after they had left Jane's room (and it cannot be assumed that his evidence to that effect was false), it is readily understandable that in

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view of what had happened in Jane's room and the obviously strained relationship between Khanyile and the deceased, he would ask about her on the next day. There are other aspects of appellant's evidence which the trial Court regarded as improbable, or as manifesting evasion. It is not necessary to deal with them. I am far from persuaded that they do reflect improbabilities, or show evasiveness in the appellant, but even if they do they are hardly sufficient, if added to the other factors relied upon, to lend to the State's case the weight it requires.

In the result I am satisfied that the evidence of Khanyile as to the killing of the deceased is unworthy of acceptance and that the appellant's denial that he killed her or took any part in the killing may reasonably possibly be true. The State therefore failed to

discharge the onus and the appellant ought to have been acquitted. Hence the order made by this Court on 5th November 1979.

MILLER, JA

TROLLIP, JA - I agree.

CORBETT, JA - I agree.