Case no 43/88
/MC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

Between:

NICO LEDUBE MNYAMANA First Appellant

MENZI TAFANI Second Appellant

- and -

THE STATE Respondent

CORAM: CORBETT CJ et SMALBERGER, VIVIER, EKSTEEN JJA et FRIEDMAN AJA.

HEARD: 3 NOVEMBER 1989.

JUDGMENT DELIVERED: 3 NOVEMBER 1989.

REASONS FILED: 20 NOVEMBER 1989.

REASONS FOR JUDGMENT.

2/...

FRIEDMAN AJA:

On 3 November 1989 the appellants' appeals were upheld and their convictions and sentences set aside. The Court indicated that its reasons would follow. These are the reasons.

The two appellants were charged together with three co-accused in the Queenstown Circuit Court of the Eastern Cape Division, with the murder of one Maqanda Gxalaba ("the deceased"). For convenience I shall refer to the appellants as they were described in the Court a quo viz as accused Nos 1 and 2 respectively, and similarly to their co-accused as accused Nos 3, 4 and 5 respectively. Despite their pleas of not guilty, all the accused were found guilty

by the Court a quo (SOLOMON AJ and assessors). In the case of accused Nos 1 and 2 no extenuating circumstances were found and they were accordingly sentenced to death. In the case of the remaining accused, sentences of imprisonment were imposed. Leave having been granted by the trial court accused Nos 1 and 2 appealed to this Court against their convictions and sentences..

They thereafter made an application to the Eastern Cape Division for two special entries to be made on the record in terms of sec 317 of the Criminal Procedure Act no 51 of 1977. The special entries which they sought read as follows:

> "The First and Second Appellants (the First and Second Accused in the above Honourable Court) both suffered grave, irreparable and

substantial prejudice in the course of the proceedings in the above Honourable Court, due to the irregularity during their Trial in that in the course of the hearing and after the conclusion of the evidence of each of the in camera witnesses for the State, namely 'X' and 'A', the Court prior to hearing all of the evidence in the case, discharged each of the State witnesses from prosecution in terms of the Provisions of Section 204 of Act No. 51 of 1977.

The First and Second Appellants (the First and Second Accused in the above Honourable Court), both suffered grave, irreparable and substantial prejudice in the course of the proceedings in the above Honourable Court due to an irregularity during their Trial in that the assessors Mr O.L. Oosthuizen and Mr J.A.F. Nel were not sworn in as assessors and consequently the Court was not properly constituted."

The first special entry was granted by VAN RENSBURG J, but the second special entry was refused. A petition to the Chief Justice for leave to have the second special entry made, met with a similar fate.

Despite the fact that there was no special entry on the record with regard to the alleged irregularity as to the swearing in of the assessors, appellants' counsel sought to argue that the irregularity was apparent from the record and that it was open to him to take the point. He based this on the fact that there was nothing on the record to indicate that the assessors had in fact been sworn in. This argument is unsound. There is no provision in Act 51 of 1977 to the effect that the fact that assessors have been sworn in must be recorded on the record. The fact that the record contains no

reference to the assessors having been sworn in, does not constitute even prima facie evidence that they have not been sworn in. There is accordingly no basis on which it could be found that an irregularity occurred in regard to the swearing in of the assessors.

Before dealing with the special entry arising from the alleged premature discharge of the two State witnesses, it will be convenient to refer briefly to the facts.

The State case was that the deceased met his death on the night of 2 January 1986 in the Sandbult location at Burgersdorp in the district of Albert by what has generally become known as a necklace murder, and that the five accused jointly participated in this unlawful killing. The two State witnesses were Carswell Funo and Eric Bangani. (At the trial they were

referred to respectively as "X" and "A" as the trial court had ordered that their identity was not to be disclosed.) They both testified to having been eye-witnesses to the assault upon the deceased. They were both described by SOLOMON AJ as quasi accomplices, presumably because of their evidence that they had not voluntarily participated in the activities which led to the death of the deceased but had done so by reason of the fear of reprisals should they have refused to do so.

Both Funo and Bangani testified that the deceased had been taken out of a house, that he had been assaulted, that stones had been thrown at him, that he had been stabbed in his side by one of the accused, that a motor car tyre had been placed over his body, that petrol and/or paraffin had been poured into

the tyre which had then been set alight. As will appear presently, the two so-called quasi accomplices contradicted each other on fundamental issues and in addition, there were conflicts between the evidence which each gave in chief compared with their evidence under cross-examination.

Funo was, before testifying, warned by SOLOMON AJ in terms of sec 204 of the Act. At the conclusion of his evidence SOLOMON AJ enquired of the prosecutor when the witness should be given his discharge from prosecution and whether the State had any objection to his being discharged. The prosecutor having indicated that he had no objection, SOLOMON AJ instructed the interpreter as follows:

> "Tell the witness that he is discharged from prosecution in this case under the provisions

of Section 204(2)(a) and that the discharge will be noted on the record of the proceedings."

Bangani was similarly warned in terms of sec 204 before he commenced his evidence and when he had concluded his evidence, SOLOMON AJ again asked the prosecutor whether he was satisfied that a discharge should be granted and having been given the necessary assurance by the prosecutor, SOLOMON AJ instructed the interpreter as follows:

"Tell the witness that he has now completed his evidence, and in the opinion of the Court he gave his answers frankly and honestly and I accordingly direct that he is discharged from prosecution..."

Section 204(1) of the Act obliges the court,

when it is informed by the prosecutor that he intends to call as a witness on behalf of the prosecution a witness who will be required to answer questions which may incriminate him, to warn the witness that he is obliged to give evidence and to answer any question put to him notwithstanding that the answer may incriminate him. The court is further obliged to inform the witness in terms of sec 204(1)(a)(iv) "that if he answers frankly and honestly all questions put to him, he shall be discharged from prosecution ....". Sec 204(2) provides that if the witness "in the opinion of the court, answers frankly and honestly all questions put to him" such witness shall be discharged from prosecution and the court shall cause such discharge to be entered on the record of the proceedings.

The question whether it was an

irregularity for a judge to grant an indemnity to a witness in terms of the equivalent section under the previous Criminal Procedure Act no 56 of 1955, at the conclusion of that witness's evidence, was raised, but not decided, in two cases which came before this Court in 1958. In R v McMillan & Another 1958(4) SA 461(A) a special entry was made on the record to the effect that the proceedings were irregular and prejudicial to the accused in that the presiding judge had in terms of sec 254 of Act 56 of 1955 discharged an accomplice from prosecution during the Crown case and before hearing all the evidence. HOEXTER JA, in delivering the judgment of the Court, stated at 469 F-G:

> "Assuming, without deciding, that the learned Judge-President acted irregularly in granting a discharge to the accomplice Nyovana before

> the end of the trial, it seems to me that the second appellant suffered no prejudice by reason of this irregularity."

Sec 254 of Act 56 of 1955 provided that if the witness "fully answers to the satisfaction of the Court ....", a discharge from prosecution shall be granted to such witness. The words "fully answers" import the idea that the witness's answers are "frank and honest". (See R v Nxumalo, 1939 AD 1 at 4, which was quoted with approval by HOEXTER JA in McMillan's case.)

In R v Mpompotshe & Another 1958(4) SA 471(A), where the trial judge had granted an accomplice witness a discharge from prosecution at the conclusion of her evidence, the point was taken that such discharge had been premature. The court found it unnecessary, however, to deal with the point.

This question has arisen under the present Act in two reported decisions in the Provincial Divisions. In S v Dlamini 1978(4) SA 917(N) MILNE J, with whom JAMES JP concurred, stated at 920 B:

> "It seems clear that it is undesirable for the discharge to be given at a stage before, at any rate, all the witnesses have testified and argument has been heard, since it might well indicate that the magistrate has prematurely come to a conclusion as to the credibility of the witness so discharged."

The learned judge went on, however, to point out that had that been the only criticism of the manner in which the matter was approached, it would not, in his view, have been sufficient to warrant a conclusion that there had been a failure of justice. This dictum was approved in S v Lubbe 1981(2) SA 854(C) but the court

there held that, in the circumstances of that case, the appellant had not been prejudiced and his appeal was dismissed.

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 a discharge may be granted the court is required to be of 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 that witness's credibility. The making of a finding such as this before hearing the

rest of the evidence, precludes the court, for the purposes of this finding, from comparing such a 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 the 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. In Mpompotshe's case supra SCHREINER, JA stated at 475 C-D that it was "not clear in what situations the power of withdrawal of a discharge may be exercised". This was because, according to SCHREINER, JA, "the two sub-sections of the procedure at a preparatory examination and the procedure at a trial" had been compressed into one section (section 254(1) of Act 56 of 1955). That compression no longer appears in the present Criminal Procedure Act which provides explicitly in section 204(3) that a discharge given at a preparatory examination shall be of no legal force or effect if the witness concerned does not at the subsequent trial answer, in the opinion of the court, frankly and honestly all questions put to him at

such trial. The section does not however, make any provision for the withdrawal of a discharge granted at a trial which was not preceded by a preparatory examination.

For these reasons I am of opinion that the learned judge's granting of a discharge to each of the accomplices when he did, was premature, and amounted to an irregularity. It does not follow from this, however, that the proceedings must necessarily be vitiated.

Irregularities in a criminal trial fall into two categories : those which are of so gross a nature as per se to vitiate the trial and those of a less serious or fundamental nature which do no per se have that effect. In regard to the latter category the

court will, on appeal, itself assess the evidence and "decide for itself whether, on the evidence and the findings of credibility unaffected by the irregularity or defect, there is proof of guilt beyond reasonable doubt": per HOLMES JA in S v Tuge 1966(4) SA 565(A) at 568 B. See also S v Naidoo 1962(4)SA 348(A) at 354 D-F and S v Mkhise & Others 1988(2) SA 868(A) where it was stated with reference to the categorisation of irregularities at 872 F-G:

> "As the decisions in our law on the nature of an irregularity bear out, the enquiry in each case is whether it is of so fundamental and serious a nature that the proper administration of justice and the dictates of public policy require it to be regarded as fatal to the proceedings in which it occurred."

I do not consider that the irregularity in the present case is one which can be categorised as fatal. It would therefore normally be necessary to decide whether, despite the irregularity, the accused's guilt has been established beyond reasonable doubt. It is, however, unnecessary to consider the effect of the irregularity since on the evidence in the present case the conviction of the accused cannot be supported.

The State case rested on the evidence of the two accomplices. There were, however, glaring discrepancies between their respective versions of the killing and the events leading up to it.

Funo placed all five accused on the scene and assigned prominent roles to each of them. Thus he testified that it was accused No 5 who had brought the deceased out of the house and that the deceased was

then held by Nos 1, 4 and 5. No 4 then handed No 1 a long knife with which No 1 stabbed the deceased in his side. After the deceased had been stabbed, he attempted to escape. Nos 4 and 5 threw stones at him as he ran, which caused him to fall. No 2 produced a tyre and put it around the deceased's neck. The deceased removed the tyre and No 2 thereupon again placed the tyre around the deceased, this time from his feet upwards. No 1 poured petrol onto the tyre and the deceased, and No 5 ordered everyone present to collect pieces of paper and plastic (in cross-examination Funo altered his evidence on this point and said it was No 4 who gave this instruction). Funo carried out the instruction. The pieces of paper and plastic which had been collected by him and others were placed in the tyre by No 2. Funo decided to leave at

that stage. Before he left, however, he saw Nos 4 and 5 throwing stones at the deceased as the latter lay on the ground. He also heard No 5 asking for matches.

Bangani's version differed from Funo's in very material respects. Bangani, who was present from the time that the deceased was brought out of the house until he was set alight, testified that he did not see Nos 4 or 5 at the scene at all, and that despite the fact that he knows them both. He stated that it was No 3 who had brought the deceased out of the house. Stones were thrown at the deceased who was trying to run away but fell and was stabbed by No 1. He did not know where No 1 got the knife. After the tyre had been placed round the deceased, No 1 lit the match.

A strange feature of their evidence is that despite the fact that they were both in close proximity

to the accused, neither saw the other at the scene of the crime. Funo, when recalled, stated that he knew Bangani, that he did not see him there but that he would have seen him if he had been there. Bangani was, on his own evidence, in close proximity to the deceased, having been instructed by the accused, according to his evidence, to prevent the deceased from escaping. How Bangani could have failed to see Nos 4 and 5 at the scene, having regard to the prominent roles they were alleged by Funo to have played, is incomprehensible - assuming of course, that Funo was telling the truth. On the other hand, if Bangani's evidence is accepted, it follows, as a probability, that Nos 4 and 5 were not present and that Funo was lying.

A further strange feature is that although

both these state witnesses testified to the deceased having been stabbed in his side, the post-mortem report which was handed in at the trial by consent, (the district surgeon not having been called), makes no mention of such a stab wound. The post-mortem report mentions under the heading of "most important post-mortem findings in regard to the body", that there were two 2cm incised wounds in the deceased's head. Later in the report these two wounds are referred to as lacerations. Counsel for the State attempted to explain the absence of any reference to a stab wound in the deceased's side, by submitting that once the cause of death had been clearly established, the district surgeon probably did not consider it necessary to examine the body for further wounds. It is difficult to accept this explanation. Experience has shown that

even if a deceased has one fatal wound, the pathologist performing the post-mortem examination examines the body and normally itemizes all the other injuries he finds. Whatever the reason may be in the present case, the district surgeon's report does not corroborate the accomplices' evidence of a stabbing in the side of the deceased. This point was not adverted to in the judgment of the trial court.

The learned judge in the court a quo indicated that he was aware of the need for caution in regard to accomplice evidence. Thus he stated :

> "Although they are described as quasi-accomplices, the evidence of either of them can be sufficient to found a conviction, subject to the fact that caution in accepting that evidence is essential. Where a second

> accomplice is called caution must be exercised in accepting that evidence as well. But corroboration of an accomplice's evidence is not essential provided that that evidence is reliable. However, it is trite that acceptance of the evidence of the accomplice is permissible only where the quality of that evidence and the shortcomings of the evidence of the accused are clear and unmistakable. Having said that I must also point out that this does not imply that the evidence of the accomplice or accomplices should necessarily be free of all defects."

The learned judge then proceeded to deal with their evidence and certain of the discrepancies and contradictions and concluded as follows:

> "While, as I have indicated, there are discrepancies between the evidence given by X and A, in all material respects their

> versions correspond. In assessing the importance of these discrepancies it will not be overlooked, as I have indicated, that the incidents occurred not in a static situation but in a mobile situation. A number of people were present, not all involved, and the witnesses X and A viewed the incidents from different vantage points."

The learned judge then went on to state that having "studied with great care their demeanour in the box" the court was satisfied that they had given their evidence "clearly and unhesitatingly". He proceeded:

> "their descriptions tallied in so many material respects, that minor discrepancies such as I have mentioned can be accepted as reasonable".

In dealing with what he called "minor

discrepancies", the learned judge did not refer, at all, to the fundamental difference between the two accomplices as to which of the five accused were present. He merely stated that the deceased was "eventually run to earth in a house at about 9 pm by a group which included all five accused". The contradiction between the accomplices as to which of the accused had brought the deceased out of the house, was merely glossed over by the learned judge who stated:

> "Either one person or a number of persons entered the house, and the deceased was brought out by one of the accused. The witness A (Bangani) says that it was no 3 who brought him out."

The learned judge did not refer, in this

context, to the evidence of Funo or to the contradiction between what Funo said and what Bangani said. He concluded his assessment of the evidence of the two accomplices by stating :

> "In this case the two witnesses described a moving spectacle involving a number of people at night. Moreover a spectacle that occurred some twenty months earlier. What does emerge unmistakably from their evidence is a clear picture of what must have occurred. A picture moreover which seems in many respects to be confirmed by the film which the police took of the scene of the crime. What also emerges unmistakably is the identification by the two witnesses of the persons now appearing as the accused in this court."

What emerges from the evidence of these two witnesses is anything but a clear picture. It is a

picture bedevilled by unexplained contradictions and inexplicable features. Nor can the identification of the five accused be said to emerge from this picture. The police film to which the learned judge referred, was a video which the court was invited to view during the course of the State case. After the court had viewed the video, the prosecutor stated :

> "I would like to place on record merely that the scene shows that the scene of the attack took place in a gravel street. The fence was viewed as well as the burning area and also various items of rubbish which appear to have been in that particular vicinity. Apart from that the general nature of the houses in the area is all that really can be ascertained from the scene and then of course the body was viewed again, of which we do have two photos in as exhibits already."

That is all that appears on the record about the video. In my view this video, whatever it might have contained, cannot be described as providing confirmation of the picture that emerged from the accomplices' evidence.

Having dealt with the evidence of the two state witnesses, the court proceeded to consider the evidence of each of the accused. However, having to all intents and purposes already accepted the evidence of the two accomplices, the court found that the accused were lying because the evidence of the accomplices was accepted. For example, in dealing with No 1's alibi which was that he was drunk and was put to bed by his brother who was called as a witness and who corroborated No 1's evidence, the learned judge said:

"This type of defence is impossible to refute, and it has to be judged in conjunction with other evidence which is available. In this case we have a positive identification of the accused by two witnesses who were found to be credible. He was seen at about 9 pm, and after 9 pm by them in the street. His movements described by them do not suggest that he was under the influence of liquor to any great extent, much less to the extent described by his brother. Appreciating that there was nothing in the evidence of Kusani which could be shown explicitly to be false, we cannot overlook the fact that his evidence is in total contradiction to that of two acceptable witnesses."

The learned judge concluded by stating that "having heard both the accused and Kusani (his brother) we do no believe their evidence".

Similarly, in the case of accused No 2, the

learned judge stated :

> "Accused no 2 claimed that he was at home on the evening of January 7 1987, and that he went to bed after 9 pm. Although his mother was in the house where he lived she was not called as a witness to corroborate his story. His claim that he was at home therefore stands uncorroborated. Faced with the evidence (of) X and A who specifically identified him as one of the principal actors in the case, we reject his evidence and therefore his alibi."

The cautionary rule in the case of accomplice evidence is aimed at overcoming the danger of an accused being wrongly convicted on the evidence of an accomplice who not only has a motive for telling lies but is, by his inside knowledge of the crime, peculiarly equipped to convince the unwary that his

lies are true. See Rex v Ncanana 1948(4)SA 399(A) at 405. If there is corroboration of an accomplice's evidence implicating the accused, that would normally provide a sufficient safeguard. The risk of convicting an accused on an accomplice's evidence would also be reduced if the merits of the accomplice as a witness and the demerits of the accused are beyond question. In the present case there is no corroboration of the accomplices' evidence implicating the accused. The two accomplices do, on certain aspects of the evidence, corroborate each other. However, before the evidence of one accomplice can be accepted as corroborative of that of another accomplice, the court must bear the cautionary rule in mind in relation to the corroborating accomplice. See S v Hlapezula & Others 1965(4) SA 439(A) at

440-441. In view of the serious deficiencies in the evidence of the two accomplices, to which I have already referred, the evidence of neither could, if the cautionary rule be applied, be regarded as acceptable corroboration of the evidence of the other.

For these reasons the evidence did not justify the conviction of accused No 1 or accused No 2 and the conviction and sentence in respect of both were set aside.

G. FRIEDMAN AJA.

CORBETT CJ)
SMALBERGER JA)
VIVIER JA) Concur.
EKSTEEN JA)