C of A (CRI) No. 8/01

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

MAMOTSEOA SENYANE **APPELLANT**

and

REX **RESPONDENT**

CORAM:

STEYN, P
RAMODIBEDI, JA
MELUNSKY, JA

HEARD: 22 MARCH 2007

DELIVERED: 4 APRIL 2007

Summary

Criminal law – Murder – Appellant convicted of murder – Appeal against conviction only – Evidence alleging conspiracy to kill – Appellant luring her gardener (A1) to kill her husband – Crown relying on accomplice evidence – The law

relating to such testimony analysed.

Held: Court a quo correctly concluded that the merits of the accomplice witness (PW4) and the demerits of the evidence of both A1 and the appellant were beyond question – PW4's testimony also corroborated by other witnesses and by objective evidence – Appellant was proved to be a lying witness in material respects – Common purpose doctrine correctly invoked – Appellant's guilt established by overwhelming evidence – Appeal dismissed.

JUDGEMENT

RAMODIBEDI, JA

[1) On 30 November 1999 the appellant stood trial jointly with one Ts'epo Solane (A1) in the High Court on an indictment charging them with the murder of the appelant's husband, Edmond Sefatsa Senyane

("the deceased"). The Crown allged that the murder took place on 29 May 1990 at or near Semphetenyane in the district of Maseru.

[2] On 23 October 2001 both the appellant and A1 were convicted as charged. Extenuating circumstances having been found in respect of each accused, the trial court sentenced them to 15 years imprisonment each.

[3] It should be noted at the outset that A1 did not appeal against either his conviction or sentence. This appeal has been brought by the appellant against conviction only.

[4] In a nutshell, the Crown's case was that in 1967 the appellant, a young woman of 19 years of age at the

time, got married to the deceased who was then 50 years old – an age gap of 31 years. As age inevitably caught up with the deceased who was well into his seventies at the time of the alleged murder, the appellant complained that he was no longer able to satisfy her sexual needs. In addition, she felt that he treated their children badly. Matters took a turn for the worse when the appellant turned to a younger man, Emile, for sexual gratification. In due course this affair came to the knowledge of the deceased. For some time leading up to the deceased's death, there developed a rift between him and the appellant.

[5] As a consequence of the aforegoing, it is alleged that the appellant hired A1, the couple's gardener, to murder the deceased. But not before she had

allegedly unsuccessfully tried to solicit the help of one ‘Mathuso Makhetha (PW5) to do this dirty job for her.

[6] PW5 who ordinarily resides at Matelile, in Mafeteng district, had apparently come to Maseru in search of a job. In the process she was introduced to the appellant at the latter’s residence at Lithoteng in Maseru. The appellant was herself looking for a domestic worker. PW5 testified that the appellant then said to her:-

> *“The kind of work I am offering you will be somehow difficult. Because I have a man staying with me at my house, and this man hates my children, we should not allow men to cheat us, as you are a person coming from far I think you can help me … you can help by poisoning the man I am staying with.”*

[7] According to PW5 the appellant told her that the deceased liked “European” liquor and that PW5 could help by poisoning his liquor. The deceased would not suspect anything since PW5 was staying far away.

[8] PW5 was horrified by the appellant’s suggestion to kill the deceased. She says that she “got so frightened my Lord, and told her (appellant) even if I am hungry I cannot take part in the killing (sic) that man whom I do not even know”. She says that the appellant tried to persuade her further. She even produced from the sitting room two bottles, one containing poison and the other one liquor. PW5, however, remained unpersuaded and left the appellant’s residence in horror.

[9] Such was the appellant's alleged persistence to kill the deceased that she was not undaunted by PW5's rejection of the idea. Henceforth, the story is perhaps best told by the accomplice witness, Moliehi Rantho (PW4). I should add that the Crown's case rested mainly on the evidence of this witness.

[10] PW4 gave damning evidence against the appellant and A1. She testified that she was 50 years old. At the material time in question she lived with A1 as lovers. She only went as far as Standard 2 at school. As a result of her limited education she had no knowledge of calendar months. Sometime in the "second month," but in winter in 1990 and at about eight o'clock at night, the appellant arrived at the place where PW4 and A1 were residing as live-in lovers. She requested PW4 and A1 to accompany her

to her house as she came from the residence of one Moipone. This, they did although PW4 was initially reluctant because she was drunk.

[11] En route to the appellant's residence, the appellant disclosed to PW4 the conspiracy to kill the deceased. She uttered the following words to PW4:-

> "*Moliehi, do you know that we have agreed with Tsepo (A1) that this is the day we are going to kill Ntate Senyane?*"

A1 confirmed that what the appellant had told PW4 was correct. The latter in turn was not prepared to participate "in killing of a person" but was allegedly threatened to do so by the appellant in these words:-

> "*if you are not going to participate you will be the first one to be killed".*

[12] PW4 says that she became frightened when, upon arrival at the appellant's residence, the latter woke up the deceased who had been sleeping in the kitchen and instructed him to go with A1 and PW4 to the other side of the Phuthiatsana river. The pretext given was to go and fetch a sheep which the appellant was going to slaughter for her children's celebration.

[13] Before the party left for Phuthiatsana river, the appellant proceeded to her bedroom and came back with an iron rod, Exh "5" which she clandestinely held in such a way that the deceased could not see it. She secretly handed it to A1 with the words:-

> *"you should throw him (the deceased) at a deeper place",* apparently in the river.

According to PW4 the iron rod in question was the murder

weapon Exh “5”in this case.

[14] Thereafter, the party comprising PW4, A1 and the deceased proceeded towards Phuthiatsana river which happened to be in flood as it was raining. At some point close to the river, “where Tsepo (A1) was to perform the duty”, PW4 who was walking about 40 paces behind the other two people heard a chopping sound as if an axe was being used to chop wood. It came from the direction where the deceased and A1 were. PW4 then heard a voice which she recognized as that of the deceased exclaim: “Hela banna!!! (Hey men!!!”). This was followed by a splashing sound in the water. PW4 shouted to A1 and asked him whether he had killed the deceased. The latter confirmed “yes I have killed him”. PW4 felt frightened and told A1 that she was running away. She had become sober at that stage. A1

also said he, too, was running away. The two went back to the appellant's residence.

[15] Back inside the appellant's house, A1 attempted to hand over the iron rod to the appellant. Significantly it was red with blood. The appellant, however, declined to accept it on the ground that her children would see it. She "ordered" A1 to go with it "so it should not be left at her place". A1 complied.

[16] A1 reported to the appellant that he had accomplished her "mission". This was obviously in reference to the killing of the deceased. He therefore demanded his "reward" from the appellant. The latter's response was:

> *"Tsepo I said you should go back to your place the*
> *money will come along with Moliehi" (PW4).*

[17] PW4 slept at the appellant's house on the night in question at the instance of the appellant who said that she was afraid to sleep alone. If PW4's version

of the events of that night is accepted, it would seem that the appellant's conscience was starting to bother her already.

[18] Before she left the appellant's place on the following day, PW4 says that the appellant gave her "the money she had promised to give to Tsepo" (A1). It was R40.00 and the appellant specifically requested her to give it to A1. In PW4's own words, she says:-

"It was the money that was to be given to Tsepo (A1) but actually it was supposed to be M400.00".

PW4 was not satisfied with this amount because the appellant had promised to give A1 a sum of M400.00 "after he had killed her husband". The reason given by the appellant for paying out only R40.00, however, was that she was going to employ legal representatives to defend A1 if he should be arrested

for killing the deceased. She would then use the balance of the money to pay the lawyers.

[19] PW4 says that she duly handed over the R40.00 to A1. She gave him the appellant's explanation that the balance would be used to pay the lawyers.

[20] According to PW4, A1 subsequently confessed to her brother, 'Molaoa, that he had killed the deceased. This, as I observe, was not challenged in cross-examination. He also made a similar confession to his own sister, Thato. Nobody forced him to make these confessions.

[21] PW4 further testified, and this was not disputed, that A1 subsequently pointed out to the police the iron rod, Exh "5", he had used to kill the deceased. It was hidden under the mat inside the house where A1

lived with PW4. Once again nobody forced A1 to make the pointing out in question. Significantly, PW4 told the trial court that she personally did not know where the iron rod had been hidden by A1 prior to his pointing it out. She was not challenged in this version which in my view should be accepted as correct.

[22] Similarly, PW4 was unchallenged in her version that both A1 and herself pointed out the murder scene at Phuthiatsana river to the police. Nobody forced them to do so.

[23] PW4 further gave damning evidence to the effect that the appellant subsequently brought her father to the place where the witness stayed with A1 to thank the latter for doing a great job by killing the

deceased. This happened at night. No challenge was forthcoming from any of the accused to deny this damning piece of evidence.

[24] Before proceeding further, it is convenient at this stage to deal with the law relating to accomplice evidence. The starting point is no doubt section 239 of the Criminal Procedure and Evidence Act 1981. It reads:-

> *"239. Any court may convict any person of any offence alleged against him in the charge on the single evidence of any accomplice, provided the offence has, by competent evidence other than the single and unconfirmed evidence of the accomplice, been proved to the satisfaction of the court to have been actually committed."*

[25] In approaching PW4's evidence the trial court correctly sought guidance from the celebrated remarks of Shreiner JA in **Rex v Ncanana 1948 (4) SA 399 (A**) at 405-406, namely:-

> *"The cautious Court or jury will often properly acquit in the absence of other evidence*

> *connecting the accused with the crime, but no rule of law or practice requires it to do so. 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; so that satisfaction of the requirements of sec.285 (our sec.239) does not sufficiently protect the accused against the risk of false incrimination by an accomplice . The risk that he may be convicted wrongly although sec. 285 (our sec.239) has been satisfied 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 demerits of the later are beyond question."

It will be seen that the same principle was restated

by Holmes JA in **S v Hlapezula and Others 1965 (4) SA 439 (A).** See also **Bereng Griffith Lerotholi and Others v the King 1959 AC 11 (PC);** also reported in

1926-1953 HCTLR 126 (PC); Manamolela and Others v Rex 1980-1984 LAC 202; Phasumane and Others v Rex 1985-1989 LAC 168.

[26] It requires to be stated at this juncture that the learned trial Judge was fully alive to the dangers inherent in the evidence of an accomplice. He properly cautioned himself accordingly.

[27] It is convenient to digress there to consider the defence version. Both A1 and the appellant gave evidence in their own defence. They both denied having had anything to do with the alleged murder of the deceased. They testified that they did not take part in any conspiracy to kill him. While they admitted that the deceased left with A1 and PW4 to go and fetch a sheep, they denied that the deceased was killed. A1 testified that the deceased told him

and PW4 to go back when they reached Phuthiatsana river. He then saw the deceased cross the river alone. Both the appellant and A1 testified that the appellant did come back with a sheep on the following day. All of this took place in February 1990.

[28] As a point of departure from the Crown's case, both the appellant and A1 testified that the deceased simply "disappeared" in May 1990, never to be seen again. However, it is significant that they made no attempt to explain the circumstances under which he disappeared as opposed to PW4's version.

[29] The evidence of Lethaka Mokholai (PW2) is crucial. He is the headman of Lithoteng in Maseru district. The appellant is his subject. He testified that the appellant reported to him that the deceased was "missing". She did not tell him how long he had been missing for. But more importantly, PW2's evidence is recorded as follows:-

> *"A2 (the appellant) then said to me that I must not talk about this as her husband had disappeared and she did not want this information to be disclosed".*

In cross-examination the following question was put to PW2 on behalf of the appellant:-

> "DC: *A2 never said to you that you should not disclose her husband disappearance.*
>
> PW2 : *She said so".*

[30] In her evidence, however, the appellant did not deny PW2's version. It would thus seem that there is a conflict between the appellant's evidence and counsel's instructions. The fact of the matter is, I stress, that PW2's version was not challenged. It must therefore be accepted as correct. This, as the trial court correctly found, demonstrated a guilty conscience on the appellant's part.

[31] As fate would have it, there is another material twist to the case. About two months since the deceased

was last seen alive, some herdboys at the Phuthiatsana river made a gruesome discovery of “bones which they likened to those of a human being”.

[32] The investigating officer, N0.4609 D/Sgt Khanyapa (PW7), confirmed in his evidence that he proceeded to the area in question. He was accompanied by Captain Lerotholi, policeman Ramohau and Sgt Lehata who was then a trooper. On the bank of Phuthiatsana river they observed “bones like those of a human being”. Below the bank they noticed “a skull like that of a human being”. They also discovered clothing consisting of a grey blanket and a vest or “skipper” in the water, a “Vasco da Gama”, a blue or grey pair of trousers, a belt, a black pair of shoes and a jersey. They took away these items of clothing as well as the bones in question.

[33] The clothes and bones were subsequently identified as those of the deceased. The identifying witnesses

in this regard were:-

(1) Matumelo Motseoa Alina Senyane (PW1), a 65 years old woman who resides at Lithoteng in Maseru district. She is the deceased's granddaughter. It is not disputed that she was brought up by the deceased. She identified him by his teeth and head. She testified that the deceased's forehead was "plain and not protruding".

(2) Nthethe Senyane (PW3). He is aged 64 years and is a former second Lieutenant. He is related to the appellant in that she is his maternal uncle's wife. He identified deceased's clothes at Maseru Central Charge Office. He also identified the skull in question as that of the deceased.

(3) Retselisitsoe Senyane (PW6). He is deceased's son. He, too, identified deceased's clothes. He also identified the bones as those of the

deceased. He testified that he knew the deceased's skull because he used to shave him. He identified the skull by its non-protruding shape.

[34] Despite this overwhelming evidence of identification of the deceased's remains and clothing, the appellant disputed this. She denied that the bones and the clothes in question were those of the deceased. In due course, however, she was confronted with something which she simply did not recover from. It is this.

[35] After the deceased's remains and clothing had allegedly been discovered as stated above, the appellant admittedly made an application in the High Court under Case N0.CIV/APN/194/90 interdicting the deceased's next of kin from burying the remains of the deceased. These included PW6 who, as indicated in paragraph [33] above, is the deceased' s son.

[36] Crucially, it emerged from paragraph 7 of the appellant's own affidavit in support of her application that the deceased disappeared "on or about 28 May 1990" and not in February 1990 as she sought to convey at the trial. More importantly, she averred on oath that "his (deceased's) body was found on or about the 27 July at Phuthiatsana".

[37] To crown it all, it is common cause that the remains of the deceased were released to the appellant by a High Court order. In these circumstances, the appellant cannot now reasonably be heard to deny that these remains were those of the deceased.

[38] Moreover, the court a quo made a correct finding, in my view, that "according to the evidence before me, except the Senyane family, nobody has claimed clothing or human remains deposited at Phuthiatsana river or its tributary". It follows that the court a

quo's finding that the human remains in question were those of the deceased is fully justified on the facts. Such a conclusion is also consistent with the findings of the medical practitioner and forensic pathologist, professor A. Olivier who examined the skeletal remains in question, namely:-

> "*4. I came to the conclusion that material examined represented the skeletal remains of an adult male, is probable age ranging from 65 - 75 years. Taking into consideration the ligaments and the tissues still attached to the bones I am of the opinion that death could have ensured about 2 months before the remains were discovered. Examination of the skull shows lesions consistant with the application of a penetrating force on four separate areas of the skull. The appearance of these lesions are consistant with lesions caused by an instrument such as the exhibit shown to me; I am of the opinion that the application of the force could have been during life, about the same time, taking in consideration the appearance of these lesions. I am of the opinion that the*

application of one or more or all of these forces could have been the cause of death".

As will be recalled from paragraph [4] above, the deceased was into his seventies at the time of his alleged murder. This reasonably tallies with the age estimated by Professor Olivier.

[39] It is important to note that, after seeing and hearing the witnesses, the learned trial Judge made very strong credibility findings. He believed PW4's evidence and correctly treated her as an accomplice. By the same token, he properly applied the cautionary rule as stated earlier. In the result, he correctly came to the conclusion that PW4's merits as a witness and the demerits of both A1 and the appellant were beyond question. In adopting this approach the learned Judge is supported by authority. See for example **R v Ncanana** (supra). In contrast, the learned trial Judge found the appellant to be "a scheming, [duplicitous], false and unreliable witness." He rejected her evidence. I can find no

fault with these findings on the facts.

[40] The fact that the deceased's body was found at Phuthiatsana river corroborated PW4's evidence that it was there that the deceased was "killed" and fell in the water. Indeed it is right to say that, in the light of the Crown's evidence as correctly admitted by the trial court, and viewed at in its totality, the only reasonable inference to draw is that the "chopping" sound that PW4 heard as fully set out in paragraph [14] above was made by A1 at the time he struck the deceased with the iron rod. Similarly, the "splashing" sound was made by the deceased when he fell in the water. See **R v Blom 1939 AD 288.**

[41] Furthermore, the discovery of the deceased's remains with the "injuries" observed by Professor Olivier does not only corroborate PW4's evidence but it is also proof that the provisions of section 239 of the Criminal Procedure and Evidence Act 1981 as fully set out in paragraph [24] above were satisfied.

[42] In summary, the evidence of PW4 was corroborated in the following material respects:-

(1) PW5 corroborated PW4 on appellant's desire to kill the deceased.

(2) A1 pointed out the murder scene at Phuthiatsana river.

(3) The murder scene as pointed out by A1 is in the general vicinity of the place where the clothing and remains of the deceased were found.

(4) The clothing and remains of the deceased were found at the spot which PW4 pointed out as being the place where the deceased had been assaulted.

(5) The skeletal remains discovered at Phuthiatsana river were conclusively identified as those of the deceased.

(6) The injuries on the deceased's skull were consistent with the use of the murder weapon Exh "5".

(7) The murder weapon Exh "5" was pointed out by A1. It had been hidden underneath the mat in a house which he shared with PW4. Significantly, it is not disputed that PW4 herself did not know where the weapon had been hidden.

(8) The appellant lied in material respects. She lied on how the deceased disappeared. In this regard she gave conflicting versions, namely:-

(a) In the morning of an unspecified date in May 1990, she found the deceased missing from where he had slept in the kitchen.

(b) The deceased went away at night on an unspecified date and never came back.

(c) She initially admitted that the clothing and skeletal remains found at Phuthiatsana river were those of the deceased. However, as soon as she realised that she was being charged with murdering the deceased she denied this fact.

(9) The appellant requested PW2 not to disclose the information about the disappearance of the deceased, thus demonstrating a guilty conscience.

[43] In the light of these factors it is important to bear in mind the correct approach in analyzing evidence as laid down by this Court in **Moshephi and Another v Rex 1980 – 1984 LAC 57** at 59 F-H**,** namely:-

> *"The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the Appellants was established beyond reasonable doubt. The breaking down of a body*

of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual parts of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when it is evaluating evidence. Far from it. There is no substitute for detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done one may fail to see the wood for the trees."

[44] Considering the mosaic as a whole, therefore, the Crown's evidence is overwhelming that A1 killed the deceased for a reward. He was thus correctly convicted of murder.

[45] It remains then to deal with common purpose. As will be seen from what is stated above, the appellant did not accompany the decease's party on the night the later was killed. She did not physically contribute to the deceased's killing. The Crown's case against her is simply based on the doctrine of common purpose. The true import of this doctrine lies in the fact that where two or more persons associate together or agree in a joint unlawful criminal undertaking each one of them will be responsible for any criminal act committed by the other(s) in the furtherance of their common purpose. In such a situation the acts of one are the acts of the other(s). See **Sechaba Ramaema v Rex C of A (CRI) N0.8 of 2000** (unreported) and the cases cited therein.

[46] It is equally instructive to bear in mind the seminal remarks of Holmes JA in **S v Madlala 1969 (2) SA 637 (A)** at 640, namely, that :-

"It is sometimes difficult to decide, when two accused are tried jointly on a charge of murder, whether the crime was committed by one or the other or both of them, or by neither. Generally, and leaving aside the position of an accessory after the fact, an accused may be convicted of murder if the killing was unlawful and there is proof -

(a) that he individually killed the deceased, with the required dolus, e.g. by shooting him; or

(b) that he was a party to a common purpose to murder, and one or both of them did the deed; or
(c) that he was a party to common purpose to commit some other crime, and he foresaw the possibility of one or both of them causing death to someone in the execution of the plan, yet he persisted, reckless of such fatal consequence, and it occurred; see S. v. Malinga and Others, 1963 (1) S.A 692 (A.D.) at p.694 F - H and p. 695; or
(d) that the accused must fall within (a) or (b) or (c) – it does not matter which, for in each event he would be guilty of murder".

[47] As will be recalled from the evidence of PW4 and PW5 fully set out above and correctly accepted by the trial court, the appellant hatched a scheme or conspiracy to kill the deceased. She hired the services of A1 to do the killing and even supplied him with the murder weapon, namely, the iron rod Exh "5". She also involved PW4 in the scheme. It

follows that there was prior common purpose between the appellant and the actual perpetrator of the murder, namely, A1 to kill the deceased. She actively associated herself with the deceased's murder. She was given a report of the murder by A1 himself. She continued to demonstrate her association with him by paying him R40.00 as a reward for murdering the deceased. In these circumstances the acts of A1 in killing the deceased are the acts of the appellant. She is equally guilty of murder just as A1 is.

[48] It follows from the aforegoing considerations that the appellant's appeal cannot succeed. It is accordingly dismissed.

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M.M. RAMODIBEDI

JUSTICE OF APPEAL

I agree :

_____

J. H. STEYN

PRESIDENT OF THE COURT OF APPEAL

I agree : _____

L. MELUNSKY
JUSTICE OF APPEAL

FOR APPELLANT : MR. H. NATHANE

FOR RESPONDENT: ADV. R.E. GRIFFITHS