

IN THE HIGH COURT OF SWAZILAND

CRIMINAL CASE NO.116/96

In the matter between:

REX

VS

FANOSE NKONYANE

CORAM : MATSEBULA J

FOR THE CROWN : MR. NGARUA

FOR THE DEFENCE : MR. M. MAMBA

JUDGMENT

5/3/97

On 3rd March 1997 when the charge of murder was put to accused he pleaded not guilty and Mr. Mamba who appeared for him indicated that the plea was in accordance with his instructions.

Mr. Ngarua who appeared for the Crown informed the Court that he had been informed by Mr. Mamba that a certain statement allegedly made by accused to a judicial officer was being contested on grounds that accused had been influenced by the investigating officer Sergeant Ntshangase deposed the said statement.

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Mr. Mamba confirmed that the defence was challenged in the first statement giving more details why they were challenging the statement and gave the following reasons:

-the preliminary questions put to the accused before making the statement clearly indicates it was in voluntary;

the learned Magistrate ought to have gone further and probed the accused to satisfy him that accused is making the statement voluntarily.

The court then allowed the trial within the trial to take place in order to determine the admissability of the said statement. Contesting statements made by suspects to judicial officers is dealt with in terms of the provisions of Section 226(1) of the CRIMINAL PROCEDURE AND EVIDENCE ACT 67 OF 1938. The onus in these matters always rests on the Crown to prove the admissability thereof beyond reasonable doubt. See in this respect REX VS DOUGLAS ZWANE SLR 1976 P.231 and the other case cited there.

At the end of the trial within the trial the Court gave a ruling on the admissability of the statement which I need not repeat here, save to refer to it and order that be read specifically into the record. The ruling was that the statement was admissable as it has satisfied the requirements of Section 225(1) referred to above.

The Crown had led the evidence of PW1 Jotham Nkonyane who was presented as an accomplice witness and the Court explained the position of an accomplice witness' rights and obligations. This was in terms of the CRIMINAL PROCEDURE AND EVIDENCE ACT also in terms of the case law.

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PW1 deviated from the evidence he made to the police and stated the reason for that being that the police had assaulted and threatened him, they suffocated him which resulted in the statement he made with the police. Further evidence he gave before court depicted the deceased as the most rude and troublesome woman responsible for causing his son's wife to flee the homestead. She was also responsible for evil spirits possessing the accused and causing him sleepless nights.

He had confronted her about her behaviour towards the members of his family and she had accused the daughters-in-law for reporting her to him because they wanted him to have sexual intercourse with him.

What the witness said in his evidence, the Court gathered, that was happened to the deceased was a welcomed act and it was regarded by all the members of the family as good-riddance. Because of the deviation by the witness from the statement he had made to the police the Crown then indicated it will not proceed leading evidence of the witness nor will it pledge to declare him hostile in order to confront him with the statement he made. There was no cross-examination by defence to the witness.

The Crown led the evidence of PW2 David Ntshangase. He stated that he was with the Royal Swaziland Police and is the investigating officer in the case. He stated that he had received information and proceeded to Esikhawini , Empangeni in the Republic of South Africa. He was in company of other police officers. It was at this stage that Mr. Mamba stood up and interjected stating that he was

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reserving the right to object and challenge the manner the accused was arrested in the Republic of South Africa saying that the Court had no jurisdiction to try the accused.

Thereupon the Crown referred the Court to Section 161 of the CRIMINAL PROCEDURE AND EVIDENCE ACT. This Section deals with the plea of not guilty and submitted that the accused had by this plea indicated that he had no objection to the court's jurisdiction.

Mr. Ngarua referred the court to Section 14(7) which is what the defence was going to rely on. The Section deals with exception to the court's jurisdiction - the accused cannot divulge at this stage Section 14(7). The accused by this plea had demanded that the court should try him on his plea to the logical conclusion of the trial. Mr. Mamba declined to pursue the matter any further.

PW2 stated that he managed to trace accused with the assistance of his counterparts in the Republic of South Africa at a certain homestead and arrested him after explaining their mission. The accused was brought back to Swaziland and kept in custody. It was only the following day that they interrogated him about the death of his senior mother.

PW2 stated that he warned accused accordingly and that he was not obliged to talk but whatever he says would be taken down in writing and would be used in court. It was not until the following day that the accused was taken before Magistrate to make a statement. Even his biological mother

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was the police station when accused's statement was made. PW2, accused and his mother went to a place at Lavumisa where she pointed out a spot where a gun was to be unearthed. When the gun could not be found his mother told the police that when she hid the gun she was with a small boy. The small boy was then summoned and the boy informed the police that after his grandmother had hidden the gun he removed it because the grandmother was subsequently arrested by the police. When the gun was ultimately unearthed the accused informed the police that that is the gun he used. The accused then took the police to the spot near the house of the deceased where he had told the police that an empty cartridge would be found. The police searched for the empty cartridge and they found it.

The Court allowed this piece of evidence by the accused because in the court's opinion it did not amount to a confession as accused did not explain what he meant by ' it was a gun he had used.'

PW2 took possession of the gun and the empty cartridge. He told the court that he had asked PW1 Nkonyane about the gun and PW1's senior wife. PW1 had said the gun was his. PW2 had also interviewed the other members of the deceased's family, names appear in list of the witnesses, have been duly subpoenaed they failed to turn up for the court hearing. This is clearly the reason the Court has referred to that the members of the family were happy that the deceased is dead.

Under cross-examination PW2 denied that he had told the accused bluntly that the making of the statement before the Magistrate would assist him at his trial. He stated that in his evidence he had told the accused that in view of the

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fact that he was the investigating officer in the matter it would be better if the statement was made before an independent person like the Magistrate. He stated that he had cautioned the accused accordingly when he took him to where an empty cartridge was found. He stated that it was the accused who had searched for the empty cartridge and found it. He further states that the accused had then told him 'it was the cartridge that had been discharged after he had fired the gun.' PW2 stated that the empty cartridge and the gun was sent to Pretoria for examination and had not been received back at the time of the trial. He stated that he had interviewed Jotham Nkonyane about the gun and Nkonyane told him that he had purchased it from a Shabangu. He had interviewed the other members of the family who unfortunately disappeared and were not available to come and give evidence even though they were subpoenaed.

By consent, the post mortem report was handed in as exhibit 'A'. Exhibit 'A' shows that the deceased was Sellinah Matsenjwa aged 60 years. She had died as a result of haemorrhaging resulting from an injury caused by a firearm involving both lungs and the right atrium.

The doctor's finding in exhibit 'A' has also reflected that a bullet was found embedded in the body of the deceased.

The Court ruled that the statement is admissible. According to the statement the accused had admitted having shot Sellinah Matsenjwa because she was bewitching the members of the family.

This is corroborated by PW1 in-so-far-as the allegation that the deceased was bewitching members of the family. Accused's statement also corroborates Sergeant

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Ntshangase's evidence and PW1 had admitted the gun found with the assistance of accused's biological mother and the young boy and identified by accused as the gun he had used was his.

For the sake of completeness in view of the accused's statement the Magistrate's statement which was extracurial that the gun was the one he had used in pointing the discovery of the spent cartridges in-so-far-as whether or not one understands the Judges Rule.

I wish to point out that the Judges Rule purely administrative without any form of law, non-compliance or insufficient compliance with the provisions will therefore, not necessarily render a confessional statement, confession or admission inadmissible. See in this respect REX VS HOLMES 1947(1) SA 567A, of course this does not mean that the Court will disregard the extent to which the rules were followed in determining the voluntaries of the statement or otherwise.

In the present case the Court is satisfied that he accused was aware of his choice not to make the statement if he so desired. The Court has found that the accused made the statement voluntarily. At the close of the Crown case the defence closed its case without calling the accused even though a prima facie had been made against the accused to explain certain things. This does not mean that the accused bears any onus of excluding that he is guilty but once the prima facie case has been made against a person and he does not give evidence in rebuttal thereof the prima facie which is not been rebutted is the one factor which the court

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takes into account in considering whether or not the Crown has proved its case beyond reasonable doubt.

In weighing the evidence as a whole considering the probabilities merits and demerits, I am satisfied the Crown has proved its case beyond reasonable doubt. Even beside the statement which has been accepted which was made before the Magistrate there are other factors which have also led this Court to infer that the accused is guilty. In the result the Court find accused guilty as charged.

J.M. MATSEBULA

JUDGE