IN THE APPEAL COURT OF SWAZILAND

APP. CASE NO.30/83

In the matter of

ANNAH N. DLAMINI Appellant

and

REX Respondent

coram

CORAM: LA. MAISELS J.P.

R. WELSH J.A.

N.R. HANNAH C.J.

JUDGMENT

(15/05/87)

Hannah, C.J.

On 12th December 1983 the appellant was convicted of the murder of Ronald Seyama (the deceased) and, extenuating circumstances having been found, was sentenced to seven years imprisonment back-dated to 27th March, 1982. By notice of appeal dated 18th December 1983 she appealed against her conviction but it is only now, some three and a half years later, that the record of the proceedings in the court a quo has become available so as to enable the appeal to be heard. Due to this inordinate delay the appellant has served her sentence before the appeal could be heard but, as is her right, she has elected to pursue her appeal.

The Crown's case depended almost entirely on confessions allegedly made by the appellant and her two co-accused and the principal argument addressed by the appellant's attorney to this court concerns the admissibi1ity of the appellant's alleged confession. A further alternative argument advanced is to the

effect that even if the confession of the appellant was properly admitted there was no, or no sufficient, evidence to establish that the deceased was murdered and accordingly the Crown failed to satisfy the proviso to section 238 (2) of the Criminal Procedure and Evidence Act. This provides that an accused may only be convicted on a confession unconfirmed by other evidence if the offence "has, by competent evidence, other than such confession, been proved to have been actually committed".

It is convenient to consider the alternative submission first and I therefore proceed to set out the evidence led by the Crown in the court below other than the evidence of the alleged confession. It was not disputed that in the late evening of 27th March, 1982 the deceased was found by motorists lying injured in the middle of the road near an establishment known as the Happy Valley

Motel in the Ezulwini Valley. He had sustained bruising and abrasions, a cut on the back of his head and intra-cranial haemorrhaging as a result of which he subsequently died. The pathologist who gave evidence of the injuries agreed that the injuries were consistent with the deceased having been involved in a road accident.

It was also not in dispute that during that evening the appellant and one of her co-accused had been drinking with the deceased at the Happy Valley Motel. Alfred Nxumalo, a security guard at the motel, said that he had in fact seen all three accused drinking with the deceased and that the deceased was so drunk he was unable to walk. This must have been a slight exageration because the witness went on to say that the last he saw of the deceased was when he was near the road which runs past the motel, the appellant and one of the co-accused having themselves departed in the direction of a certain shop. The witness agreed with defence attorney that the deceased was so intoxicated as to be a danger to

himself and motorists should he have walked on the road.

There was further evidence that when the deceased was subsequently discovered lying injured in the road he was in possession of keys belonging to the appellant. The appellant's explanation for this, which was not challenged, was that she had earlier agreed to allow the deceased and her sister, the co-accused, to sleep at her quarters and had given him the keys. She also said that after the drinking session at the motel she had left alone to return to her employer's premises where she was going to spend the night and on the way she met a group of people standing near a body in the road. She was asked if she knew who it was and replied that she did not because at that stage she did not realise it was the deceased.

This leads me to the only evidence, apart from the confessions, which gives rise to suspicion that the deceased may have met his death other than as a result of a hit-and-run road accident. There was cogent evidence that when the deceased was first seen by passing motorists lying in the middle of the road the appellant was nearby at the side of the road. According to one witness she was walking in the direction of Mbabane, according to another she was standing at the side of the road and appeared to hide her face and according to another he saw her running towards Mbabane. In my opinion, the most that can properly be said of this evidence is that the appellant was in the vicinnity of the deceased when he was first discovered. Lastly, there was the evidence of a police constable that when he questioned the appellant at the scene about the man in the road she said she knew nothing of him though there was no evidence, that she was given the opportunity of seeing his face. However, when the connection between the keys and the appellant was made she gave the explanation that the deceased was the man who had earlier asked

for accommodation for the night, the explanation which she later repeated at her trial.

Apart from the confessions that, in essence, was the Crown's case and, with great respect to the learned trial judge, I have considerable difficulty in understanding how he was able to conclude on this evidence, as he did, that the Crown had establi-shed beyond all reasonable doubt that the deceased was murdered and that the possibility of him having been the victim of a hit-and-run accident could be completely ruled out. Indeed, before this court Mr. Nsibandze for the Crown was obliged virtually to concede that there was insufficient evidence to support such a conclusion. There was evidence that the deceased was by himself near the road in a drunken condition: there was evidence that he was subsequently found lying in that road with injuries consistent with having been involved in a road accident: and the behaviour of the appellant,

although perhaps giving rise to some suspicion, falls far short of indicating by way of inference or otherwise that either she or some other person had assaulted the deceased and then placed him on the road. In my judgment the only real evidence to establish that a murder had taken place comes from the alleged confessions made by the three accused and in consequence the learned trial judge erred in finding that the proviso to section 238 (2) had been satisfied.

There remains the question whether there was any confirmation of the appellant's alleged confession for if there was the proviso does not have to be satisfied. See R v Blyth 1940 AD 355. In that case Tindall J.A. said at page 364: "Confirming evidence means evidence outside of the confession which corroborates it in some material respect" and the question is whether any such evidence exists in the present case. Had the appellant pointed

out the murder weapon to the police that, for example, would have provided corroboration in some material respect, but in the present case none of the evidence adduced by the Crown outside that relating to the alleged confession can be said to be inconsistent with the appellant's innocence. Accordingly, in my judgment, whatever the merits may be regarding the admissibi1ity of the alleged confession, the learned judge was not entitled to rely upon it and, as without the confession the Crown had no case, the appellant should have been acquitted. I would therefore allow the appeal.

N.R. HANNAH

CHIEF JUSTICE

I agree

I. A. MAISELS

JUDGE PRESIDENT

I agree

R. WELSH

JUDGE OF APPEAL