



IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.23/00

In the matter between:

**SKHOMBISO ISAAC MKHATSHWA
VS
REX**

APPELLANT

RESPONDENT

CORAM

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**STEYN JA
BROWDE JA
BECK JA
MR. TWALA
MRS. DLAMINI**

**FOR THE APPELLANT
FOR THE RESPONDENT**

JUDGMENT

Steyn JA:

Appellant appeared in the High Court on a charge of murder. He was found guilty and sentenced to 12 years' imprisonment. He has appealed both against his conviction and sentence. His appeal was noted on grounds set out in a letter dated the 24th of November 1999.

One of the grounds raised by him was that "the witnesses did not deliver the evidence in chief before the Court." In order to understand this complaint it is necessary to

summarize what took place at the trial before Sapire CJ.

The record reflects that the murder charge was read to the appellant and he was asked to plead. His response is recorded as follows:

“ACCUSED: My Lord I understand the charge and I plead guilty to culpable homicide.”

The appellant was represented by counsel who is then recorded as saying:

“I confirm the plea.”

Crown counsel then proceeded to read into the record what was subsequently referred to by her as “agreed facts.” Because of our views concerning the undesirability of conducting proceedings in the manner evidenced by the record in this case, these “agreed facts” are set out in full. They are recorded as follows:

“CC: PW1 who is a sister to the accused...Your Lordship its as it appears in the summary of evidence although there are some few additions...PW1 who is a sister to the accused and a daughter of the deceased saw accused at about 0500 hours arriving home. Accused had been away for a long time from home. Deceased was a blind woman. Accused got into the house and slept. He woke up at about 1000hours and went to the neighbours. He came back carrying a stick and went straight to the deceased. He assaulted the deceased with it. PW1 raised an alarm. PW2 responded to the alarm. PW2 was also assaulted by accused. PW2 then took deceased with her to her homestead. Along the way accused came running and stabbed deceased several times with a knife. PW2 ran away to raise an alarm. PW3 responded to the alarm. He found accused stabbing deceased. Accused then ran away to hide inside a homestead in the same area. Deceased was rushed to a nearby clinic but was pronounced dead few minutes later. The matter was reported to the police and PW5 arrested the accused on the same day.”

JUDGE: Are those all the agreed facts?

CC: I will add more Your Lordship.

JUDGE: Please carry on.

CC: The accused then stated the reasons for stabbing the deceased to death as that deceased refused him to have his clothes put in deceased’s homestead. The second reason was that he believed that his father had died because of deceased’s

witchcraft actions. Those are the reasons that he stated when he was arrested Your Lordship.

JUDGE: Is that the complete..?

CC: That is all Your Lordship.”

The Court then asked defence counsel what he had to say about the “agreed facts” as read into the record by Crown counsel. He responded as follows:

“DC: My Lord the main reason which led to this incidence (sic), according to the accused, as my learned friend has pointed out, was that the accused was no longer residing at the homestead. When he came back returning home the deceased, which is the mother to the accused person, refused him permission to reside at the homestead or to return his property. The accused felt provoked by this as he had no other accommodation.”

At this point the court interrupted counsel and said:

“So he is entitled to stab his mother because of this?”

To which counsel responded by saying: “That’s the point...”

The record next shows that the court then asked counsel to explain to him “Why this is culpable homicide and not murder?”

Defence counsel then makes the following comment:

“And My Lord further, the accused originally believed that the deceased was responsible for the death of the father through witchcraft My Lord and as such he always held the deceased at fault for the death of the father.

JUDGE: Yes?

DC: Those are the reasons My Lord which led to this incident and that is how the quarrel started after the argument regarding these two points and which led to the killing.”

The Chief Justice, clearly concerned about the propriety of the acceptance of a plea of guilty of culpable homicide, in these circumstances said:

“Once this plea has been accepted have I got any discretion in the matter?”

To this Crown counsel responded by saying that the appellant had not pleaded guilty to

culpable homicide. When asked by the judge what he had pleaded, Crown counsel said: “He was read the charge and he pleaded guilty as charged.” He added: “Those were extenuating circumstances.” The record then reads as follows:

“JUDGE: I am sorry I missed that. Because I find this ...

CC: He is saying he is not challenging anything, that is, there is no need to call witnesses.

JUDGE: In that event, I find him guilty of murder as charged. Are the facts you read out what I must rely for mitigating circumstances?

DC: I have some few points.” (these were points to be raised in mitigation)

A dialogue then ensued between the Court and defence counsel. During the course thereof the latter said:

“DC: My Lord my instructions are that the problem started after the death of the father and the accused left the homestead to say at his place of employment and he was subsequently retrenched during this time of this incidence and he came back home. And it was on his arrival that he asked to go and fetch the other property which he had left back at his work place and only to be denied by the deceased to do that. And I am saying that he had no other place to live at except the homestead after the retrenchment at his workplace. Those are the extenuating circumstances that we have.”

The Court then asked Crown counsel whether she accepted the facts stated by the appellant as “extenuating factors” to which she responded by saying:

“CC: The belief in witchcraft Your Lordship.”

Further facts and submissions were presented by defence counsel. At the conclusion of these the Court proceeded to give reasons for sentence and passed a sentence of 12 years’ imprisonment on the appellant.

It is on the above facts that this appeal has to be decided.

The following questions arise:

1. How did the appellant plead in the Court below?

Mrs. Dlamini who appeared for the Crown both in the High Court and in this court assured us that the appellant had pleaded guilty as charged. If this was the Crown’s contention, an application for the amendment of the record should have been made, duly supported by affidavits explaining how the error occurred. No such application has been

made, and it would be improper for us to make a finding on this issue in the absence of acceptable evidence as to the fact that the record incorrectly reflected appellant's plea.

In the light of the order we intend to make, it is not necessary to give directions as to how the matter is to be resolved.

2. "What is the appropriate procedure to be followed in the event of an accused pleading guilty to a murder charge"

Section 238(1) of the **CRIMINAL PROCEDURE AND PROCEDURE ACT 67/1938** provides that if an accused pleads guilty in the High Court to an offence other than murder the Court may sentence him for such offence without hearing any evidence.

Evidence had therefore to be led to enable the Court to determine not only that the offence had been committed but, in the event of such proof, whether after a proper enquiry extenuating circumstances were found to be present. As to the need to prove the commission of the offence by admissible and satisfactory evidence, see: **R VS KHUMALO 1930 AD 193**; **S V LOMBARD 1967(4) SA(A) 538** at 541; **S V K AND ANOTHER 1964(2) SA539(T)**, at 540 and **R V FOUCHE 1958(3) SA767 (T)**, at 774.

Mrs. Dlamini contended that the statement of agreed facts was sufficient evidence for this purpose. She relied in this regard on the provision of Section 272(1) of Act 67 of 1938 which reads as follows:

"In any criminal proceedings the accused or his representative in his presence may admit any fact relevant to the issue and any such admission shall be sufficient evidence of such fact."

In the work "COMMENTARY ON THE CRIMINAL PROCEDURE ACT," du Toit, de Jager et al, at 24-80, the learned authors say:

"An accused may only admit facts, not evidence of those facts."

In the same paragraph they also say: "Care should therefore be taken in regard to the form in which these admissions are made."

See in this regard **S V NZUZA 1963(3) SA (A) 631**; **S V SEROME AND ANOTHER 1968(4) SA420 (A)** at 426.

The portion of the record cited above demonstrates clearly how far the so called statement of agreed facts falls short of the requirements to enable its contents to constitute "sufficient proof" as provided for in Section 161. Certainly the incoherent, unintelligible and confused contributions of Crown and defence counsel, failed to lay a

factual foundation on which a court could rely with any confidence to make its findings. This, in turn, meant that the court's determination of what in fact the extenuating circumstances were and the extent to which they and other personal factors mitigated the offence allegedly committed by the appellant, was inevitably based on unclear and incoherent material.

It is in any event our view that the proper procedure when trying an accused on a charge of murder is always to lead evidence. It is a long standing and salutary practice when an accused pleads guilty of murder, to enter a plea of not guilty. (See **SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE 2ND ED.**, page 373). The court then proceeds to hear evidence not only of the fact that the offence has been committed, but also evidence which will satisfy the court of the fact of the accused's guilt and his degree of legal and moral blameworthiness.

None of this was done in this case. There has therefore in our view been a serious irregularity which vitiates the proceedings in the High Court.

3. What is the proper order for this Court to make in these circumstances?

It is our view that the proceedings in the High Court were a nullity. The appeal must therefore be upheld and the conviction and sentence are set aside. The Director of Public Prosecutions is at liberty to have the appellant arrested, to re-indict him and to have him retried in the High Court on the same charge. In view of the gravity of the offence with which he was charged, it is manifest that the Director of Public Prosecutions should do so. In view of the irregularity the accused was never in jeopardy of being convicted and cannot plead *autrefois acquit*.

J.H. STEYN JA

I AGREE : J. BROWDE JA

I AGREE : C.E.L. BECK JA

Delivered on the day of December 2000.