IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE Appeal Case No. 20/99

In the matter between

MNCAYI HARRY MTHETHWA Appellant

Vs

REX Respondent

CORAM LEON, JP
VAN DEN HEEVER, JA
BECK, JA

For Appellant In Person
For the Crown Mr. M. T. Nsibandze

JUDGMENT

LEON, JP

In this case the appellant was convicted of murder with extenuating circumstances and sentenced to 15 years' imprisonment. The appeal is brought against both the conviction as well as the sentence.

When the appeal was called the appellant's counsel was not present. However the court

enquired from Mr. Nsibandze, who appeared for the Crown, whether he supported the conviction. After some discussion, counsel for the Crown conceded that the Crown was not able to support the conviction. This concession was in accordance with the view which the Court had formed about this case. The Court made an order allowing the appeal and setting aside the conviction and the sentence stating that reasons would be filed later. These now follow.

At the commencement of the case the court a quo held a trial within a trial in order to determine whether a certain statement made by the appellant to a police officer but not recorded before a Magistrate was admissible. It held that it was not because it was a confession but nonetheless relied upon it in its finding that extenuating circumstances were present in this case. In this regard the court said this:-

"Your victim may never have known that you suspected him to be a witch."

Apart from the confession which was excluded there was no evidence whatsoever before the trial court that the appellant suspected the deceased "to be a witch".

I turn now to deal with the evidence which was led. The correctness of the post-mortem report on the death of the deceased was admitted by consent. It was to the effect that the deceased, one Zephania Maraiza Dlamini, aged 65 years, had died as a result of liver laceration which was caused by a gunshot wound and that the post-mortem examination was carried out on the 22nd June 1998 which was two days after the death of the deceased.

Having failed in its attempt to secure the conviction of the appellant by reason of the confession the Crown relied upon other evidence to which I shall briefly refer.

One of the investigating officers in this case is PW8 Constable Sihlongonyane. After the death of the deceased the appellant was arrested and interviewed. The appellant made a report to him. As a result of the report they proceeded to Makholweni. There the appellant, about 150 metres away from his homestead in a field, pointed out a spot underneath some grass. They dug up the soil and they found a pistol loaded with five rounds of ammunition and other ammunition which was not in the magazine but wrapped in plastic. They also found 20 12-bore live rounds of ammunition for a shotgun which was red in colour. The son of the appellant was present.

They then went to the alleged scene of the shooting together with the appellant to search for an empty cartridge. One was subsequently retrieved by some school children but not in the presence of the appellant. It was handed to Sergeant Magagula who is the scene of crimes officer.

With regard to the firearm which was exhibited, there was no ballistic evidence whatever to show that it was the weapon which killed the deceased nor was there evidence that the empty cartridge (which was not produced in evidence) was fired from the firearm. Thus neither the

firearm nor the cartridge was proved to have been linked to the death of the deceased.

PW8 denied a suggestion in cross-examination that the spot where the firearm was retrieved was pointed out by police officer Vilakazi. He also denied that before the pointing out the appellant was assaulted by himself and other police officers.

He agreed that the appellant and his son were both detained and in different police cells.

It was suggested to him that he said to the appellant that he was wasting his time and his son had already told the police that the firearm was hidden. The witness said that the appellant's son informed the appellant that he had told the police that the firearm was hidden at Makholweni.

He denied that the appellant's son was crying and that his eyes were red.

The appellant was taken to a magistrate to make a statement but was advised by his then attorney not to do so and he did not make any such statement.

Albert Dlamini was PW7. He was asked by the police to accompany them to the scene of the shooting and assist them in finding the empty cartridge. He travelled to the scene with the appellant.

The appellant said to him not to worry and that the deceased was injured by him (the appellant). One Maduna, who has since died, was present. The appellant said that he had injured the deceased because the latter had killed his children. The appellant did not say how he had killed the deceased. There was no evidence that any of the appellant's children were killed. Indeed in his evidence the appellant said that they were alive.

In cross-examination it was put to him that the appellant would deny having made any admissions to him. The witness replied that he had and that if Maduna were still alive he would confirm that

He also denied that the appellant had, under the "sisa" custom ever lent any beasts to him or that the appellant had retrieved one or that he was very bitter about the matter or that he had ever gone to the royal kraal and told lies against the appellant.

The Crown then informed the court that it had decided not to call the son of the appellant presumably because it felt that it could not rely upon his evidence.

However the court decided to do so; and Makhosonke Robert Mthethwa who was to have been the fifth prosecution witness, but had been abandoned as such, was nevertheless sworn in as PW5.

He did not witness the shooting of the deceased but he said that he and his father had buried a firearm. His father told him that it was used in injuring the deceased.

In cross-examination he agreed that one of some 'sisa' cattle had been returned to his father by Dlamini, the others having died, which was in conflict with Dlamini's evidence.

He said that he was assaulted by the police. His hands were tied together and he was suffocated with a tube. He said that the police also assaulted his father.

He then contradicted his earlier evidence by saying that his father had never told him that he had injured the deceased. Then when asked by the Judge he said again that his father had told him so. A short while later he repeated to defence counsel that he and his father had never discussed the death of the deceased.
Then he was asked again by the Judge which version was true and he answered that his father had told him that he had injured the deceased.

With so many contradictions in evidence it is not possible to place any reliance upon it at all. However in his judgment the learned Judge found that under cross-examination he maintained the position he had taken and did not "budge". That in my view is a clear misdirection on the facts.

There is a further problem which relates to his evidence. At page 77 of the record, and while counsel for the defence was cross-examining PW5 the Court intervened as follows:-

> *"Judge: Let us not put leading questions. I am not stopping you from asking leading questions because you are entitled to cross examine if you like but if you put question in that way, suggest an answer. The answer you get is not worth much."*

Defence Counsel then said:-

> *" Let me rephrase the question. Fortunately he had not answered it."*

The intervention by the learned judge a quo had the effect of inhibiting the cross-examination. It was not justified and amounts to a misdirection. Once a witness has been called by a court counsel for the Crown and the defence are free to cross-examine such witness for he or she is not called by them: he or she is not their witness. They cannot, and should not be,

deprived of such right nor should it be restricted as it was in this case; nor is it correct that answers to leading questions "are not worth much." The answers may be invaluable to destroy the credibility of the witness.

The appellant gave evidence under oath. He testified that he had denied all knowledge of the gun to the police. The police then assaulted him saying that he was wasting their time. His son told the police that the firearm was at home. They then took him to the deceased's homestead where they came out with a woman Ntshakala (the sister-in-law of the deceased.).

A police officer, Vilakazi, pointed out a spot and asked the lady to dig. They found a plastic bag containing a firearm. The appellant told the police he knew nothing about it.

He said that there was enmity between himself and Albert Dlamini over cattle: he had sisaed three cattle to Dlamini, two of which had died and Albert did not want to return the third one to him. He denied having said anything to Albert Dlamini about the deceased: the latter was a liar. He added that his children were not killed: they were still alive.

With regard to his son's evidence he said that his son had been tortured by the police.

The appellant testified that he was a traditional healer who used muti. He admitted in cross-examination that he used to give the skin and the head of the cattle to the Dlamini family and some of the meat and at that time there was no bad blood between them.

It was put to him that if the police had assaulted him he would have reported to his chief but he did not. But the appellant said that he had already been detained by the police and never went home.

He assumed that the police went to dig at the spot in question because of what Ntshakala must have told them.

He denied having a firearm and said that to the extent that his son's evidence implicated him his son had been tortured by the police.

The Court then, before the defence had closed its case, called Elizabeth Ntshakala who was sworn in as PW10.

It appears from page 93 of the record that the first part of her evidence was not

recorded.

She confirmed other evidence that the appellant pointed out the spot where the police were to dig. She did not know what the police were looking for. She gave the police a digging tool. She denied a suggestion in cross-examination that she was lying. The appellant's son was also present.

She was unaware of any trouble between the appellant and the deceased or between the appellant and Albert Dlamini.

A witness Sikhumbuzo Mzikalifani was sworn in as DW1. He said that he was the appellant's uncle but it transpired that they were second cousins. He confirmed that the appellant had sisaed three cattle to Mr. Dlamini a long time ago. Two had died and an ox had remained. It was he who had collected the remaining ox from Mr. Dlamini. His evidence is thus in conflict with that of the latter.

In dealing with this conflict the court a quo held that the defence evidence on this point was not of such weight that it ought to find that Mr. Dlamini was a liar and it was difficult to see why an honourable man such as Mr. Dlamini should falsely implicate a neighbour because of a sisa transaction.

However, what weighed with the court was clearly the evidence of the appellant's son. The court said this "whatever deficiencies there may be in the evidence, and I am not sure that there are any, are completely outweighed by the fact that the accused admitted not to one person but to two persons one of them being his own son that he was responsible for the wounding and eventual death of the deceased."

It is clear from what I have set out above that the court a quo relied heavily on the evidence of the appellant's son but it should not in my view have relied upon it at all. As I have pointed out his evidence was so full of contradictions that it should have been dismissed out of hand.

In view of the misdirections in this case, the conviction can only be upheld if a trial court, properly directed, would inevitably have come to the same conclusion. It is quite impossible to arrive at such a result. The case is a very slender one. At best for the Crown, all one has is a pointing out of a firearm not linked to the murder. As for the admission to Albert Dlamini, there was defence evidence in conflict with his and there are no adequate grounds for rejecting that defence testimony.

For these reasons the appeal was allowed and the conviction and sentence were set aside.

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LEON, J.P.

I AGREE

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VAN DEN HEEVER, J.A.

I AGREE

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BECK, J.A.

DATED AT MBABANE THIS…….DAY OF MAY, 2000