Crim.Appeal Case no.24/02

In the matter between:

SAMSON MAGAGULA Appellant

VS

REX Respondent

CORAM : BROWDE J.A.

BECK J.A.

ZIETSMAN J.A.

JUDGMENT

Zietsman J.A.

The appellant was convicted in the High Court of murder and of attempted murder. In respect of the murder conviction extenuating circumstances were found to be present and he was sentenced to 15 years imprisonment. The sentence on the attempted murder conviction was 5 years imprisonment two of which were conditionally suspended for 3 years. It was further ordered that the sentences would run consecutively. The appellant appeals against both his convictions and his sentences.

It was common cause at the trial that the complainant on the attempted murder charge (hereinafter referred to as the complainant) was to himself face a charge of attempted murder, the allegation being that he had shot and attempted to murder the appellant's brother.

The Crown case is that the complainant and his wife, the deceased, were clearing trees from some land which they intended to plough. The appellant and a man Lucas arrived at the place where they were working. The appellant was armed with a shotgun. The appellant greeted them. He then suddenly pointed the shotgun at the complainant. As the complainant turned away from him the appellant fired a shot and the complainant was struck by pellets on his upper left shoulder. He ran away. The deceased who then also tried to run away was shot by the appellant. Several pellets fired from the shot gun struck her in the back and lacerated her right lung, causing her death.

The appellant, who gave evidence at the trial, admitted that he had fired the shot that struck and injured the complainant and the shot that struck and killed the deceased. He stated that after he and Lucas had met up with the complainant and the deceased, and while he was talking to the deceased, the complainant asked the deceased why she was talking to "those people". The complainant then reached for his shirt which was lying rolled up on the ground. The appellant alleged that he thought that there was a firearm rolled up in the shirt and that the complainant intended to shoot him, just as he had shot his brother. The appellant stated that he then fired a shot at the complainant but missed him. He reloaded the shotgun and fired a second shot at the complainant. He alleged that the deceased was then standing behind the complainant and she was accidentally struck by the pellets. His defence was that he had fired the two shots at the

complainant in self-defence because he thought that the complainant intended to shoot him with a weapon rolled up in his shirt. There is no evidence to suggest that there ever was a firearm rolled up in the complainant's shirt.

In addition to the evidence of the witnesses two documents were handed in by consent. These two documents are the post-mortem report on the body of the deceased and a statement allegedly made by the appellant to a magistrate. In his argument before us the appellant's counsel submitted that the two documents could not be relied upon as only copies and not the original documents were handed in.

Concerning the post mortem report the record reflects the following.

CROWN: So my Lord I then make an application that the two medical reports

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be handed in by consent and that the identity of the deceased person is not an issue.

DEFENCE: I confirm, My Lord.

JUDGE: So I recorded that by consent the Post-mortem Report will be handed in and will be marked Exhibit "B" and then that the identifying witness is being dispensed with by consent.

There was no further objection to this procedure being followed. It is not clear from the record whether the original report signed by the doctor or whether only a copy thereof was handed into Court. What is clear however is that the contents of the report were not contested. The copy contained in my appeal record, which is apparently a photocopy, contains the signature of the doctor who carried out the post mortem.

Concerning the statement made by the appellant to magistrate, the admissibility thereof was contested and a trial-within-a-trial was held to determine its admissibility. During this trial-within-a-trial the appellant gave evidence. He stated that he was forced by the police to write down what had happened and "to tell the whole truth". He was then forced by the police to tell the same story to the Magistrate. It was at no stage suggested by the appellant that he had been told what to write down in his statement or what he should tell the magistrate. It was never suggested by the appellant that what he told the magistrate was not in fact the truth.

The police denied that the appellant had been forced or unduly influenced to make his statement to the Magistrate and at the end of the trial-within-a-trial the trial judge ruled that the statement was made freely and voluntarily and was admissible as evidence against the appellant.

The statement made by the appellant to the Magistrate was taken down in Siswati. What was then handed into Court was apparently a photocopy of the Siswati statement and a translation thereof into English. It was not at any stage suggested at the trial, or an appeal, that the contents of the statements are not exactly what the appellant told the Magistrate. The sole point taken on appeal is that because the original Siswati statement was not

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handed in the statement did not constitute admissible evidence against the appellant and should not have been relied upon by the trial judge.

The Siswati statement was signed by the appellant. The copy which was handed into Court, and

the copy contained in my appeal record, is a photocopy of the original with the appellant's signature thereon. It was never disputed that the signature on the document is in fact the appellant's signature.

In submitting that the statement is not admissible as evidence against the appellant his counsel, Mr Maseko, referred to the best evidence rule and in particular to the cases of S VS TSHABALALA 1980 (3) S.A. 99 (A) AND R VS. AMOD & CO. (PTY) LTD & ANOTHER 1947 (3) S.A. 32 (A). These cases lay down the principle that before secondary evidence of the terms of a writing may be given it has to be proved that the original document has been destroyed or lost and that a proper search has been made for it. Where the document has allegedly been lost the presiding Judge or Magistrate must be satisfied that a thorough search has been made for the original document before secondary evidence thereof can be admitted.

A question which arises in this case is whether the documents in question, the post-mortem report and the statement made by the appellant to the magistrate, are to be regarded as secondary evidence.

In the case of Da MATA VS OTTO N.O. 1972 (3) S.A. 858 (A) it was held that where carbon paper is used and a document is written out and signed in such a way that the carbon copies contain the same writing and signature of the writer, the carbon copies are deemed to be original, and not secondary, documents. It was similarly held in the case of HERSTIGTE NASIONALE PARTY VAN SUID-AFRIKA VS SEKRETARIS VAN BINNELANDSE SAKE EN IMMIGRASIE 1979 (4) S.A. 274 (T) that a copy of the original roneoed constitution of a political party can be accepted as an original specimen of its deed of foundation. In the later case of WELZ AND ANOTHER VS HALL AND OTHERS 1996 (4) S.A. 1073 (C) the following is stated at page 1079 C - E.

"As far as the best evidence rule is concerned, it is a rule which applies nowadays only in the context of documents and then only when the content of a document is

directly in issue.....The rule is a very ancient one. It goes back to the Dark Ages,

well perhaps the twilight days, before faxes and photocopying machines, when making copies was difficult and such copies as were made were often inaccurate. Under those circumstances Courts, naturally, insisted upon production of the original document as being the most reliable evidence of its contents. Nowadays, a Court can be asked to permit the use of a copy if the original of a document is not available."

In the present case the original documents had apparently been lost. The copies handed into Court were photocopies of the original documents and these copies reflect respectively the signatures of the doctor and of the appellant. It was never suggested that the signatures were not those of the doctor and of the appellant, and the accuracy of the contents of the documents was also not in dispute.

In the circumstances the two documents were clearly admissible as evidence in the case and were correctly so admitted.

According to the evidence given by the complainant he ran away after he had been shot by the appellant. He also told his wife to run away. When she was no longer in his sight he heard the shot that killed her. If this evidence is correct the story told by the appellant, namely that the deceased was accidentally struck by a shot aimed at the complainant, cannot be correct.

The post mortem report indicates that the deceased had her back to the appellant when she was shot and the appellant in his statement, in conflict with his evidence in court, stated the following:

"After shooting him (the complainant) he ran away. When the wife saw him run away she also ran away. I then shot her and she fell down and died instantly. "

These allegations are in keeping with the evidence given by the complainant and are in direct conflict with the evidence given by the appellant. The trial Court, in the circumstances, correctly rejected the evidence given by the appellant and correctly found him guilty as charged on both counts.

The appellant appeals also against his sentence. The fact that he believed that the complainant had killed his brother was apparently taken into account when he was sentenced to five years imprisonment, two suspended, for attempting to murder the complainant. The background to the case was also taken into account when extenuating circumstances were found to be present in respect of the murder conviction. It must however be borne in mind that the appellant had no real grudge against the deceased, and his action in pursuing her and killing her after he had failed to kill the complainant can in no way be justified. The sentences are in all the circumstances not unduly harsh.

In the result the appeal is dismissed and the convictions and sentences confirmed.

N.W. ZIETSMAN J.A.

I agree

J. BROWDE J.A.

I agree

C.E.L. BECK J.A.

Delivered on this... 15th.. .day of November 2002