IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIM. TRIAL NO. 239/08

In the matter between:

THE KING VERSUS

THABO SIBEKO

Date of hearing: 19 February, 2009
Date of Judgment: 3 March, 2009

Mr. Attorney Thabiso Masina for the Crown

Mr. Attorney B.J. Simelane *Amicus Curiae*

JUDGMENT

MASUKU J.

[1] On 20 January, 2009, I convicted the above-named accused person of the offence of culpable homicide and to which he had pleaded guilty. Before conviction however, I put to him all the constituent elements of the said offence and which he admitted. The statement of agreed facts was also admitted by him. It was in that context that I returned a certitude of guilt and was, at the

time satisfied that his plea was unequivocal. The judgment on conviction, I should mention, was delivered *ex tempore.*

Having convicted the accused of the said offence, and it having been established that he was a first offender, I directed him to make oral submissions, alternatively, lead evidence in mitigation of sentence. That step, in this bifurcated trial, appeared to raise more questions than answers.

The accused, in the course of his oral address, mentioned that he was a mental patient at the time of the commission of the offence and was attended to by Dr Mangezi in relation to his affliction. This statement raised the Court's eyebrows for the reason that it raised the possibility that the accused may well have been labouring under a mental condition at the time, a fact, which if proved, could have serious implications even for the conviction returned.

Considering that the accused was unrepresented and could, out of ignorance, not have mentioned his mental state at the time, I issued an order for Dr. Mangezi to file a report regarding the accused's mental state, which could affect the sentence in any way. In response, Dr. Mangezi instead filed his earlier report dated
12 August, 2008, directed to the Registrar of this Court. Shorn of all the details contained in that letter, the learned doctor opined as follows:-

> "In my opinion, at the time of the alleged offence Thabo Sibeko had mental disorder."

I must hasten to mention that a copy of this report was not in the Court file during the plea-taking stage and had its existence, and particularly its contents been drawn to the Court's attention timeously, the Court's approach to the whole trial may have had to be markedly different.

In the light of the contents of the said report and in particular its contents as quoted above, considered *in tandem* with the fact that the accused was unrepresented, prospects wrought by proceeding to sentence the accused not withstanding that a substantial issue regarding his mental state had been raised would offend my sense of justice. I then decided to order the Registrar to appoint an *amicus curiae* who could assist the Court in trying to chart a fair and just way forward in the matter. The services of Mr. B.J. Simelane were thus secured and I would be remiss in my duty if I did not express the Court's appreciation for him agreeing to come into harness at short notice and bringing his sedulous submissions to bear on this matter. Mr. Masina also conducted his research commendably.

Both Counsel filed comprehensive heads of argument and to which I shall presently make reference. The initial issue to be decided though, was whether in the light of the conviction, the Court was entitled, in view of the accused's state of mind as recorded by Dr. Mangezi, to reopen the issue and possibly enter a different plea. Put

differently, the question confronting the Court was whether it had, by convicting the accused, become *functus officio* and could do one of two things: *viz* proceed to sentence the accused or refer the matter to the Supreme Court for its opinion and directions.

My attention was pertinently drawn by Mr. Simelane to the cyclostyled judgment of *Justice Sipho Magagula and Others v Rex* Appeal Case No. 4/2000 (C.A.). In that case, the trial Judge died after convicting the accused persons but before, in relation to the murder charge, the Court could enquire into the existence or otherwise of extenuating circumstances. The Court of Appeal held that extenuation formed part of the conviction and that it was not open for another Judge to have conducted the enquiry relating to extenuation. For that reason, the murder charge was ordered to start *de novo* if the prosecution was so inclined. What becomes clear from reading the judgment as a whole is that the Court is not *functus officio* until it has pronounced the sentence.

[9] It having been established that this Court is not *functus officio* for the reason that sentence has not as yet been passed, the question revolves around what the Court can do in the circumstances, in view of Dr. Mangezi's report. As to the direction to be adopted, Mr. Simelane, helpfully referred the Court to S *v Van Rensburg* 1963 (2) SA (N.P.D.) 343. In that case, a Regional Magistrate submitted papers to the High Court seeking an order that the verdict of guilty he had returned be

set aside and that the matter be remitted to him to enable the taking of further steps by him.

[10] The circumstances in which the order was prayed for are the following: The accused had been charged with theft, to which he pleaded guilty and was thereupon convicted thereon after evidence *aliunde,* proving commission of the offence had been led. When the accused made submissions in regard to sentence, he enquired if the trial Court had not been placed in possession of letters from a doctor in Cape Town or from his father. It then transpired that the prosecution had letters stating that the accused had been in a mental hospital. It was not clear as to why the letters had not been disclosed to the Court during the trial. Had these letters been disclosed, the Court may well have sent the accused to a mental institution for observation before dealing any further with the case.

[11] In the Natal Provincial Division, the matter served before Caney J. (with Kennedy J. concurring). At page 343 G-H the learned Judge said:-

> "Normally an accused person would be the one to make application to the Court for a setting aside of a verdict in order that further evidence might be heard, and he would need to satisfy the requirements laid down in *R v Weimers & Others* 1960 (3) S.A. 508 (A.D.), namely, show an acceptable explanation for failure to produce the evidence at the trial, show that the evidence is such as would presumably be accepted as true, and further, show that there is a probability that the result would be

different if the case were remitted and the further evidence produced."

[12] The Court found that the above elements had been met in the matter before it and it accordingly ordered the verdict of guilty to be set aside and that the case be remitted to the Court *a quo* for further investigation. A not dissimilar situation also arose in S *v Hlongwa* 1963 (1) SA 14 (N.P.D.). The Court, per Caney J. and

Milne J.P. also remitted the case to the Court *a quo,* after setting aside the conviction.

[13] It will be seen that the two cases, above are similar to this case in certain respects. It is also true that they are, in other respects dissimilar. The similarity lies in the fact that the issue which gives rise to a doubt regarding the propriety of the verdict only came to light during mitigation. On the other hand, the difference is that in both cases, it was not the trial Court that set aside the conviction but a superior Court did so and ordered further investigation to be conducted by the trial Court.

[14] I should mention that the instant case is clearly one in which the imperatives set out in the *Van Rensberg* case *(supra)* have been met. In the first place, it is my considered opinion that there is an acceptable explanation for the accused's failure to produce this evidence during the trial but before conviction. In this regard, it must be considered that the accused has not

previously had a recorded brush with law. He is a first offender who was apparently making a first appearance in Court. That considered in *tandem* with the fact that he was unrepresented and could, therefore not have known what effect his earlier condition could have on the trial indubitably provide a reasonable explanation in my view.

Secondly, it is abundantly clear that the evidence, regard had to the contents of Dr. Mangezi's report, would presumably be accepted as true. In this case, Dr. Mangezi had prepared his report a few months before the accused stood his trial and there is no gainsaying that the evidence he is likely to adduce, given the contents of his report, would presumably be regarded as true. Lastly, it is clear as noonday that the result could be different if the evidence of Dr. Mangezi was to be had recourse to. It is possible that the accused may be found not guilty or the Court may return the verdict of "guilty but insane".

The events in this case show that this Court has infact convicted the accused of the offence of culpable homicide. After that conviction, some evidence emerged and which was previously unknown both to the Court and the prosecution. Although the accused would have known about it, it is now an established fact that he has a history of mental illness; was appearing in Court for the first time; is unlettered in law and was unrepresented at the trial. All these factors could, either individually or cumulatively, have had an effect on the accused's failure to raise the issue of his mental illness, either during the plea-taking or in the preparation of the admitted facts.

[17] The question to ask relates to the proper way forward. There are, in my view three possible ways of dealing with that issue. One would be to exclude the "new evidence" and proceed to sentence the accused person well knowing that the sentence could, on account of the disregarded evidence be set aside by a higher Court. I expressly will not follow that course for it is unjust and clearly unfair. It was considered in the *Hlongwa* case *[op cit)* at page 16, where the Court quoted Herbstein J. in *Rex v Smit* 1948 (4) SA 266 (C), where the Court said:-

> "Every consideration of convenience and justice supports the view that this Court should act now instead of sending the matter back for sentence to be passed and then exercising the powers given by section 98 (4) of the Magistrates' Court Act. To insist upon a sentence being imposed with the knowledge that the verdict and sentence are to be set aside would be to enact a farce." (Emphasis added).

I certainly do not intend or propose to enact one.

[18] The second route would be to refer this matter to the Supreme Court as a stated case in terms of section 17 of the Court of Appeal Act 74 of 1954. In that event, the Court of Appeal would deal with the matter and thereafter give guidance to this Court, which may even include the third route to which I will advert below. In this case, the accused remains in custody and our Supreme Court it is common cause, sits on an *ad hoc* basis. There is no guarantee that the matter can be placed and heard

by that Court immediately. In any event, whatever the case, the Supreme Court would in all probability remit the matter back to this Court for finalization. I do not think that referring the matter to the Supreme Court in the circumstances would be the preferred route at this stage.

The last route is for this Court, realizing the likely impact of Dr. Mangezi's report, to set aside the proceedings thus far and enter a plea of not guilty. This is the route strongly advocated by Mr. Simelane. This, it must be recalled, would be done on the strength of the now settled position that this Court is not *functus officio.* Mr. Masina advocated for this Court proceeding on the present plea and calling Dr. Mangezi, possibly as the Court's witness in terms of section 199 of the Criminal Procedure and Evidence Act, 67 of 1938. Thereafter, with Dr. Mangezi having been examined and cross-examined, the Court would consider at that stage whether his evidence does have an impact on the verdict, particularly the accused's state of mind at the relevant time. If it does, the proceedings would be set aside and if not, the Court would proceed to sentence the accused accordingly.

I regrettably do not share Mr. Masina's suggested approach. I say so for the reason that Dr. Mangezi, in his report stated without equivocation that at the time of the alleged offence, the accused had mental disorder. This opinion immediately has an impact on the propriety of proceeding with the matter on the plea presently on the record. I do not think it is prudent for the Court to wait until Dr.

Mangezi is examined in Court for the Court to enter the appropriate plea in the face of the clear opinion he stated and which opinion can be fully investigated after these proceedings have been set aside.

It is my considered opinion that that the new evidence, which emerged before the Court could be regarded as *functus officio* casts a totally different position on the correctness of the accused's plea. As I have found that that evidence has the potential to materially change the result, not only at the end of the trial, but also the verdict of guilty, suggesting that on account of the accused's relative disadvantage in respect of his being unlettered in law; being unrepresented and the fact that he still consults with Dr. Mangezi even at this stage, the plea he tendered is, in the light of the entire circumstances particularly the new evidence, inappropriate. This, is in my considered view, a matter that should be corrected by this Court at this stage, obviating the need to proceed with this matter any further.

In the premises, the appropriate route in the circumstances, would be set aside the proceedings thus far and for the Court to enter a plea of not guilty. Whereas it would in some cases be desirable that after such an order is made, the fresh proceedings commence before a different presiding officer, I am not persuaded that such a course is called for in the instant case. I say so because no evidence has been led and no issues of credibility arise. Furthermore the accused is a first offender and no adverse inferences can poison the Court's mind in the circumstances, unlike if he did have previous convictions.

I should, in this regard mention that it may be necessary for the Legislature to make an express provision in the Criminal Procedure and Evidence Act to deal with situations like the present. This is because the present procedure has a potential to yield injustice. In this regard, the learned author Lansdown and Campbell, South African Criminal Law and Procedure, (formally Gardiner and Lansdowne) Vol.V, Juta, 1982 say the following at page 421:-

> "The expeditious procedure for conviction of an accused upon his plea of guilty in terms of section 112 of the Criminal Procedure Act, 1977, is not without hazard, particularly in the case of the unrepresented and unsophisticated accused who may stupidly or for other reason incorrectly tender a plea of guilty. Some measure of safeguard against the administration of an injustice is provided by section 113 of the Act which is applicable where the Court at any stage of the proceedings under section 112, and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty, or is satisfied that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted such allegation or that the accused has a valid defence to the charge. In any of such circumstances the court is required to record a plead of not guilty and to require the prosecutor to proceed with the prosecution."

It would, as I have said above, be an easier, convenient and time redeeming exercise to enact a section similar to section 113 of the Republic of South Africa, which reads as follows:-

> **"Correction of plea of guilty**
>
> (1) If the court at any stage of the proceedings under section 112 and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty or is satisfied that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records

a plea of not guilty, shall stand as proof in any court of such allegation.

(2) If the court records a plea of not guilty under subsection (1) before any evidence has been led, the prosecution shall proceed on the original charge laid against the accused, unless the prosecutor explicitly indicates otherwise."

In the premises, I issue the following Order:-

25.1 the conviction of the accused of the offence of culpable homicide, be and is hereby set aside.

25.2 the trial is to proceed *de novo* on the basis of a not guilty plea, with a view to the Court determining the effect if any, of the accused's mental state at the time of the alleged offence.

25.3 the Registrar of the Court is required to set the matter down as a matter of urgency.

25.4 Mr. Attorney B. J. Simelane be and is hereby appointed by the Registrar as *pro deo Counsel* to represent the accused person.

Finally, in the light of the recommendation in paragraphs 24 and 25, I order a copy of the judgment to be transmitted to the Attorney-General, for advice and appropriate action.

DELIVERED IN OPEN COURT ON THIS THE 3rd DAY OF MARCH, 2009.

Directorate of Public Prosecutions for the State.
Messrs. B.J. Simelane and Associates - *Amicus Curiae*