

IN THE COURT OF APPEAL OF SWAZILAND

APPEAL NO. CA/9/1982

In the matter between:

BHEKI HENRY MBHAMALI Appellant

and

THE KING Respondent

CORAM: MAISELS P

ISAACS J A

VAN WINSEN J A

JUDGMENT

MAISELS P

The Appellant was indicted in the High Court on a charge of murdering LUVUMA JAMES GINA. He pleaded not guilty but was found guilty and, extenuating circumstances having been found, was sentenced to 15 years imprisonment. His appeal to this Court is against both his conviction and sentence.

At the conclusion of the argument the appeal was allowed and the conviction and sentence was set

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aside, the Court intimating that its reasons would be given later. These now follow.

It was submitted by Mr V D Dlamini who appeared on behalf of the Appellant that the Crown had failed to prove beyond reasonable doubt that the Appellant had caused the death of the deceased. As far as I can make out the Crown's case was that the Appellant had stabbed the deceased thus causing his death. Before dealing with the evidence on this point I would say that, according to Sergeant Mazibuko of the Swaziland Police, the Appellant stated, after he had been arrested by the police, that he had killed the deceased by stabbing him and then throwing him into a river. This was, as was conceded by Counsel for the Crown "an unequivocal acknowledgment of guilt, the equivalent of a plea of guilty before a Court of law", to use the well-known words of De Villiers A C J in R v Becker 1929 AD 167 at 171 and thus a confession which would only be admissible if it was confirmed and reduced to writing in the presence of a magistrate or any justice who is not a police officer. OF Section 226 (1) of the Criminal Law & Procedure Act, No. 67 of 1938. It was not so confirmed and was therefore not admissible in evidence - a point which, having regard to a question put by the learned trial judge, seems to have been overlooked by him.

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The Appellant is alleged to have told other police officers that he stabbed the deceased, but none

went as far as Sgt. Mazibuko. The Appellant denied having stabbed the deceased or having told the police that he had done so, but he was regarded by the learned trial judge as an untruthful witness. Dr Khare who conducted the postmortem examination was unable to ascertain the cause of death. He explained that the body was in an advanced state of decomposition. The skin, flesh from the face, throat and limbs had been eaten. He was asked by Crown Counsel whether he had not been told that the body had a stab wound. This seems to me to be a leading question which should not have been allowed. However, Dr Khare replied that he may have been told of a stab wound near to the collar bone. He stated that he usually took the history of the case but his observations did not confirm that the body had a stab wound. The father of the deceased, who had a defective eyesight and who saw the body of the deceased some days after it had come out of a river, says he saw a wound which might have been a stab wound. Another witness, Mandla Pakathi, who saw the body at the same time as the last witness said he saw no stab wound. On the other hand, one Elias Dlamini says he saw a wound at the back between the shoulders and the neck but could not say how big or deep it was. According to Inspector Lukhele when he saw

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the body it was in an advanced state of decomposition but there appeared to him to be a stab wound above the scapula or shoulder. In cross-examination he said he did not know if it was a stab wound, but from what he saw "it appeared" to be one.

On the assumption however that the Appellant did stab the deceased, the question remains whether the Crown established that this caused his death. There was in the opinion of this Court insufficient evidence upon which to base a finding beyond reasonable doubt, particularly in the light of Dr Khare's evidence that this was indeed the case. Consequently the appeal was allowed.

SIGNED

I.A. MAISELS

PRESIDENT OF THE COURT OF

APPEAL

I agree:

SIGNED

I. ISAACS

JUDGE OF THE APPEAL COURT

I agree:

SIGNED

L. de V VAN WINSEN

JUDGE OF THE APPEAL COURT