IN THE SUPREME COURT OF SWAZILAND

Held at Mbabane **Appeal Case No.33/2010**

Citation: [2010] SZSC 12

In the matter between:

KHANYAKWEZWE DLUDLU	**APPELLANT**
AND	
THE KING	**RESPONDENT**

CORAM	**FOXCROFT JA**
	EBRAHIM JA
	MOORE JA

FOR THE APPELLANT	**IN PERSON**
FOR THE CROWN	**MR. S. FAKUDZE**

JUDGMENT

(Murder – Appeal against conviction and sentence – no "direct" evidence against appellant but credible evidence of two witnesses to whom appellant had confessed his guilt – not inadmissible hearsay evidence – sentence not inappropriate – appeal dismissed)

FOXCROFT JA:

[1] The appellant was convicted of murder in the High Court and, on the 16th September, 2008, sentenced to a period of 16 years imprisonment. The sentence was backdated to the 28th February 2005, that being the date of his arrest and confinement.

[2] The Application for Leave to Appeal against conviction and sentence dated 15th June, 2009 raised as the "main reason" for the appeal the contention that the appellant was "unfairly and wrongfully convicted and sentenced." No grounds for this submission were provided.

[3] As Mr. Fakudze for the Crown was correct to point out, the attempt to appeal the conviction and sentence was out of time, and grossly so. A Notice of Appeal should have been filed within four weeks of the 16th September 2008, and an application for leave to appeal out of time lodged. More than eight months went by before the "application for leave to appeal" was received from Matsapha Correctional Institution in June, 2009. No sufficient cause for condonation is raised and there is substance in Mr. Fakudze's submission that the

"appeal" is not properly before this court and should "not have been received as an appeal in the first place."

[4] Having regard to the fact that we were obliged to read this record on appeal, and that it is generally better to dispose of a matter, especially a criminal one, on its merits, we indicated to Mr. Fakudze that we were disposed to decide the case before us on its merits. Mr. Fakudze raised no objection.

[5] The appellant's Heads of argument raise in the main the submission that the trial court was wrong to convict and sentence him "only on the basis of uncollaborated (sic) hearsay evidence delivered by Pw 1 and Pw 2 who testified that I had told them that I had murdered the deceased."

[6] The first question which arises from this submission is whether the evidence of Pw1 and Pw2 is hearsay. Section 223 of the Criminal Procedure and Evidence Act, No. 67 of 1938, provides that

> *"No evidence which is in the nature of hearsay evidence shall be admissible in any case in which such evidence would be inadmissible in any similar*

case in the Supreme Court of Judicature in England."

[7] The effect of this section was to apply to Swaziland the English Common Law governing hearsay, going further than the similar section 216 of the South African Criminal Procedure Act No. 51 of 1977 which provided before its repeal by section 9 of the South African Law of Evidence Amendment Act, No. 45 of 1988, that

> *"No evidence which is of the nature of hearsay evidence shall be admissible if such evidence would have been inadmissible on the thirtieth day of May 1961."*

The date referred to was that of the coming into being of the Republic of South Africa, and in effect, the English hearsay rule was retained. However, the fixing of the date allowed for future departures from English Law.

[8] The Swaziland statute which speaks not of hearsay evidence which <u>would have been</u> admissible on a fixed date, but of hearsay evidence which <u>would be</u> admissible in England, clearly deals with the future. The modern English Common Law hearsay rule therefore applies in Swaziland.

[9] It has been said that an exact formulation of the hearsay rule has never been attempted by the courts, and that there is no agreement among text-book writers.

[See Hoffmann and Zeffertt : South African Law of Evidence : Fourth Edition, at 623]

Phipson stated the rule as follows in the 12th edition of his work on evidence:

> "Oral or written statements made by persons who are not parties and are not called as witnesses are inadmissible to prove the truth of the matters stated…"

The 13th edition of this work in 1982 at 329-330 drew attention to modern uncertainty surrounding the meaning of hearsay and the status of various classes of evidence lying in the twilight zone of the exclusionary rule.

[See Du Toit et al : Commentary on the Criminal Procedure Act (South Africa) at 24-43

[10] In the 3rd edition of his work on Evidence, supra, at 92, Hoffmann says that "In general it may be said that evidence is hearsay when the court is asked to rely, not upon the personal knowledge of the witness testifying, but upon the assertion of someone else." It is unnecessary for present purposes to delve further into

an examination of the precise ambit of the rule since it is well-established that the confession of an accused person in a criminal case is generally regarded as admissible since it falls outside the operation of the rule.

[11] The Fourth Edition of Halsbury's Laws of England, Vol. 17, para 61 sets out four rules of law by virtue of which statements formerly admissible at common law as exceptions to the rule against hearsay are still admissible as evidence of any facts stated in them. The first category is "admissions adverse to a party." When one turns to Volume 11 of Halsbury, op.cit., at para 405, one finds the following:

> *"Where the plea is one of not guilty, facts may be formally admitted ....or evidence may be given of admissions or confessions made by the defendant before the commencement of the proceedings."*

This is just such a case.

Of course, it remains a fundamental condition of the admissibility in evidence against any person that any statement made by him shall have been voluntary in the sense that it has not been obtained from him by

fear of prejudice or hope of advantage exercised by a person in authority.

See : Halsbury, of cit. Vol. 11 para 410

Criminal Procedure and Evidence Act, 67/1938, S.226

The provisions of Section 226 of the Swaziland Criminal Procedure and Evidence Act, 1938 demonstrate clearly that evidence of a confession of the commission of a crime is admissible on certain stated conditions.

This is in full accordance with the English common law of exceptionally received hearsay.

It should be noted further that the appellant denied ever making the statements related in their evidence by Pw1 and Pw2. This was not a case of involuntary statements precluding their admission, and a trial-within-a-trial would have been unnecessary.

See the decision of the Federal Supreme Court in **R. v. Manjonjo,** 1963(4) S.A.L.R. 708 at 709F-H.

[12] It follows that the appellant cannot succeed in his argument that the evidence against him was hearsay and therefore inadmissible. Both by existing English

common law and the Swaziland Criminal Procedure and Evidence Act, the evidence of the two crown witnesses who related his confessions to each of them prior to the trial was admissible.

[13] The second leg of the appellant's argument was that this evidence was not corroborated. Section 238 (2) of the Criminal Procedure and Evidence Act, 1938 provides that

> "Any court which is trying any person on a charge of any offence may convict him of any offence alleged against him in the indictment or summons by reason of any confession of such offence proved to have been made by him, although such confession is not confirmed by any other evidence.
>
> Provided that such offence has, by competent evidence, other than such confession, been proved to have been actually committed."

[14] At the trial, as recorded in the judgement of the Court a quo, it was admitted that the deceased died of "haemorrhage as result of multiple penetrating injuries to heart and left lung." The multitude of wounds sustained by the deceased in this case showed beyond

any doubt that he had been subjected to a particularly vicious attack and the learned trial Judge rightly noted that

> "Three photographs of the deceased in situ graphically depict the gory reality of a murder most foul."

The proviso to section 238 (2) of the Criminal Procedure and Evidence Act, 1938 has been fully satisfied. There can be no doubt that the offence of murder with which the appellant was charged, was committed.

[15] I have considered the remaining arguments raised by the appellant, and in so far as they have any bearing on the appeal, I regard them to be without merit. The appellant did not press upon us any compelling reason why his sentence should be reduced. The sentence was an appropriate one, and there is no ground for any interference.

In the result, the appeal against both conviction and sentence is dismissed.

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J.G. FOXCROFT
JUDGE OF APPEAL

I AGREE.

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A.M. EBRAHIM
JUDGE OF APPEAL

I AGREE.

_____
S.A. MOORE
JUDGE OF APPEAL

Delivered in open court on the 30th day of November, 2010.