138/1959

G.P.-S. 4706—1950-1—6,000. U.D.F. 445

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Eastern DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN KRIMINELE SAAK.

PHILANDEN CELE
Appellant.

versus

THE QUEEN
Respondent.

Appellant's Attorney ..... *Respondent's Attorney* .....
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate L. Rafferty *Respondent's Advocate* C. A. S. Brink.
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on:— Friday, 6th November, 1959.
Op die rol geplaas vir verhoor op:—

(A)

Coram: Ogilvie Thompson, Ramsbottom, Botha, Holmes et Nyak.

Appeal dismissed.
(Reasons later)

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matters between :

1. MHLOMULENI NGEMA and REGINA

and

2. MHLANGENI CELE and REGINA

Coram: Ogilvie Thompson, Ramsbottom JJ.A., Botha, Van Wyk et Holmes A.JJ.A.

Heard: 6th November, 1959. Reasons handed in: 16-11-59

J U D G M E N T

OGILVIE THOMPSON J.A. :- These two cases came before us by way of questions of law reserved by FANNIN J. at the instance of appellants and pursuant to the provisions of section 366 of Act 56 of 1955. Prior to the hearing, counsel were informed that the Court would require argument on the preliminary issue of the competence of the learned judge a quo to reserve, and of this Court to entertain, the questions of law under section 366 of the Code. After hearing counsel on that issue, we unanimously came to the conclusion that the reservation by the learned judge a quo was not authorised by the provisions of section 366 and that this Court had no jurisdiction to consider the questions of law so reserved. Both cases were, therefore, struck off the roll, it being at

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the same time intimated that the Court's reasons would be handed in later. Those reasons now follow.

Appellant Ngema was charged in the Durban and Coast Local Division, before FANNIN J. and assessors, with having murdered his brother by stabbing him. The fatal stabbing was duly proved at the trial. On the medical evidence, the trial court found - contrary to the submission of defence counsel - as a fact that appellant was, at the time when he stabbed the deceased, mentally disordered within the meaning of that expression as used in the Mental Disorders but was probably not conscious of what he was doing.
Act No. 38 of 1916, The learned judge also held - declining to follow Regina v. Mkize (1959(2)S.A.260(N.))and rejecting defence counsel's further submission, based upon that decision, that appellant was entitled to be acquitted and discharged - that in the circumstances the provisions of section 29(1) of the Mental Disorders Act were satisfied. He accordingly, in terms of section 29(2) of that Act, ordered that appellant be kept in custody in some prison or gaol pending the signification of the Governor-General's decision. A brief report of the decision of the court a quo is to be found in 1959 (3) S.A. at page 974; and in passing it may here be interpolated that Regina v. Mkize (supra) was also not followed in the later case of Regina v. Mokwanazi (1959(3) S.A.782(W.)). At the

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request of defence counsel and acting pursuant to the provisions of section 366 of the Code, FANNIN J. thereafter reserved the following questions of law for the consideration of this Court, viz. :-

"(1) Whether, on the facts found by the Court to have been proved, the mental condition of the accused was such as to render him mentally disordered or defective within the meaning of section 29 of Act 36 of 1916.

(2) Whether, having regard to the fact that the Court found that the accused was unconscious of what he was doing when he killed the deceased, it was proper or competent to return the special verdict or finding provided for in section 29(1) of Act 36 of 1916. "

Appellant Cele was charged - also in the Durban and Coast Local Division before FANNIN J. sitting with the same assessors - with having murdered his reputed wife by stabbing her. The trial court - whose judgment/.....

-ment was delivered on the same day as its judgment in Appel-lant's Ngema's case - found that, although appellant Cele did in fact kill his reputed wife by stabbing, he was at the time suffering an epileptic equivalent and was unconscious of what he was doing. Rejecting the defence advanced of auto-matic involuntary action, the court then went on to hold that, in view of its decision in Ngema's case, the proper verdict was the special verdict prescribed by section 29(1) of the Mental Disorders Act. Pursuant to this conclusion, the learn-ed trial judge, acting under section 29(2) of that Act, order-ed the accused to be kept in custody in some prison or gaol pending the signification of the Governor-General's decision. Thereafter, at the instance of appellant Cele's counsel and acting under section 366 of the Code, FANNIN J. reserved the following question of law for the consideration of this Court, viz. :-

> "Whether,having regard to the fact that the Court found that the accused was unconscious of what he was doing when he killed the deceased,it was proper or competent to re-turn the special verdict of finding provided for in Sec-tion 29(1) of Act 38 of 1916. "

In reserving the above stated questions of law FANNIN J. was fully aware that it had been decided by GARDINER J.P. in Rex v. Young (1949(3)S.A.199 (E)) that the special verdict prescribed by section 29(1) of the

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Mental Disorders Act amounts to an acquittal and that, consequently, neither leave to appeal against such special verdict could be granted under section 369(1) of Act 31 of 1917 (now section 363 of Act 56 of 1955) nor could a special entry be made in terms of section 370(1) of Act 31 of 1917 (now section 364 of Act 56 of 1955). FANNIN J. however took the view that section 366 of the Code, whereunder questions of law are reserved for the consideration of this Court, is not restricted, in its application to an accused, to a case where there has been a conviction. He accordingly decided that in terms of that section it was competent for him to reserve the above stated questions of law.

The learned judge was largely persuaded (see Regina v. Ngema, 1959(3)S.A.646) to this view by the circumstance that, in its present form, section 366 of Act 56 of 1955 no longer contains the words "and the accused is convicted" which occurred in its earlier counterpart section 372 of Act 31 of 1917 until that section was amended in 1948. This alteration in the wording of the section was unsuccessfully relied upon by the appellants in Regina v. Adams (1959 (3) S.A.753 (A)) which was decided subsequent to the reservations made in the present appeals and of which FANNIN J. was, of course, then not aware. Counsel for both appel-

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-lants in the present appeals endeavoured to distinguish Regina v. Adams (supra) on the ground that in that case it was sought to obtain from this Court a decision on questions of law reserved, pursuant to the provisions of section 366 of the Code, before the conclusion of the trial in the court a quo . Any indication in the judgment in Regina v. Adams that it is necessary for an accused to be convicted before this Court will, at his instance, entertain a question of law under section 366 must - so counsel's submission ran - be read in relation to the fact that the trial had not yet been concluded and be regarded as obiter dictum. We were unable to accept this submission. While it is true that the trial in Adams' case (supra) was far from ended, the ratio decidendi of this Court's refusal to entertain the points of law which had been reserved at the instance of the accused was that the accused had not been convicted. The history of section 366 was examined by this Court in Regina v. Solomons (1959(2)S.A.352 at page 359) and in Regina v. Adams (supra) and no good purpose would be served by now repeating that examination or by reproducing the reasoning reflected in the judgment of the later of those two cases. It suffices to say that section 366, in its present form, was authoritatively interpreted in Regina v. Adams (supra) and that, in accordance with that interpretation, a conviction is a con-

-dition precedent to this Court's entertaining questions of law reserved, at the instance of the accused, for its consider-ation pursuant to the provisions of that section.

It thus becomes necessary to deter-mine whether or not the present appellants can rightly be said to have been convicted in the court a quo. Section 182 of Act 56 of 1955 provides -

"If at any time after the commencement of any trial it is al-leged or appears that the accused is not of sound mind, or if on such trial the defence is set up that the accused was not criminally responsible, on the ground of insanity, for the act or omission alleged to constitute the offence with which he is charged, he shall be dealt with in manner provided by the law relating to mental disorders. "

Notwithstanding the express reference to the defence made in this section (and in its identical predecessor section 219 of Act 31 of 1917) it is clearly established that the Crown may itself lead evidence that the accused was "not criminally res-ponsible on the ground of insanity" (see Rex v. Holliday, 1924 A.D.250) and that, upon such proof, an accused falls to be dealt with "in manner provided by the law relating to mental disorders." That, indeed, is precisely what occurred in the present cases, for in neither did the defence seek to avoid responsibility "on the ground of insanity". As indicated earlier, the defence in both cases was, substantially, that

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of involuntary action : the evidence of"insanity" was led by the Crown. The relevant provision of "the law relating to mental disorders", rendered applicable by section 182 of Act 56 of 1955, is section 29 of Act 38 of 1916 which reads :-

"29(1) When in any indictment, summons or other criminal charg any act or omission is alleged against any person as an offence,and evidence(including medical evidence)has been given on the trial of such person for that offence that he was mentally disordered or defective so as not to be responsible according to law for the act or omission charged, at the time when the act was done or the omission incurred, then,if it appears to the jury,or in the case of a trial before a court without a jury,to the court or to the magistrate or other judicial officer before whom such person is tried,that he did the act or made the omission charged but was mentally disordered or defective as aforesaid at the time when he did or made the same,the jury,court,magistrate,or other judicial officer(as the case may be),shall return a special verdict or finding to the effect that the accused was guilty of the act or omission charged against him, but was mentally disordered or defective as aforesaid at the time when he did the act or made the omission.

(2) The presiding judge,magistrate,or other judicial officer (as the case may be) shall thereupon order the accused to be kept in custody in some prison or gaol pending the signification of the Governor-General's decision."

Examining sub-section 29(1), it lays down that, where its introductory provisions are satisfied, the court etc. must return the "special verdict or finding" described in the subpsection. The terms of that ppecial verdict,and indeed of the section as

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a whole, make it plain, I think, that the accused is not by the special verdict convicted of the offence alleged against him in the indictment summons or criminal charge upon which he has stood his trial. The special verdict does employ the word "guilty", but it is to be observed that the words are "guilty of the act or omission charged against him", and not "guilty of the offence". Furthermore, the words "as aforesaid", where they occur in the remaining portion of the special verdict, relate back to the earlier portion of the section. Thus expanded, the concluding portion of the special verdict reads: "but was mentally disordered or defective so as not to be res- "ponsible according to law for the act or omission charged at "the trial time when he did the act or made the omission." It is thus apparent that the words "guilty of the act or omission", where they occur in the special verdict, mean no more than "committed the act or omission." The Nederlands text - the signed text is the English - correctly, I think, reflects the true situation in the phrase "dat beschuldigde de daad of "nalating hem ten laste gelegd begaan heeft."

The view, reached as a matter of construction, that the special verdict prescribed by section 29(1) of the Mental Disorders Act does not constitute a conviction as that term is employed in the criminal law is, I

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think, also in accord with the general intention of the Legislature as reflected in the relevant statutory provisions. Chapter II of the Mental Disorders Act - which is headed "Provisions relating to mentally disordered or defective patients under detention in respect of criminal offences" - contains a number of provisions (see sections 27 to 42) relating to alleged or convicted criminals who are found, or who appear to be, mentally disordered. The above-cited provisions of section 182 of Act 56 of 1955 constitute a clear statement that accused persons falling within the ambit of that section are excluded from the ordinary operation of the criminal law and are to be dealt with "by the law relating to mental disorders."

Nor is authority of the greatest persuasive cogency lacking in support of the view, expressed above, that the special verdict prescribed by section 29(1) of the Mental Disorders Act is not a conviction. Save for the substitution of the words "mentally disordered or defective" (as to which see sections 2 and 3 of the Act) for the word "insane", section 29 of the Mental Disorders Act is, with the exception of certain immaterial differences, in virtually the same terms as section 21 of Act 1 of 1897(C) and its predecessor section 12 of Act 35 of 1891 (C): see also section 21 of Proclamation 36 of 1902 (T). These sections of the pre-Union statutes

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mentioned were, in turn, virtually identical with section 2 of the English Trial of Lunatics Act 1883(46/47 Victoria Ch. 38). Sub-sections 29 (1) and (2) of the Mental Disorders Act thus directly derive from, and are for present purposes indistinguishable from, section 2 of the English Act of 1883. This last mentioned section was - after some noteworthy earlier differences of judicial opinion :see Rex v. Ireland (1910(1)K.B.654 and Rex v. Machardy (1911(2)K.B.1144) - authoritatively interpreted in Rex v. Felstead (1914 A.C.534). In that case the House of Lords laid down that the special verdict is one and indivisible; that it takes the place of the general verdict of "not guilty"; and that it is a verdict of acquittal of the accused. The House of Lords, accordingly, held that an accused in respect of whom the special verdict had been entered was not "a person convicted on indictment" within the meaning of section 3 of the Criminal Appeal Act of 1907 and was, therefore, not permitted to appeal against the special verdict.

Inasmuch as the inevitable consequence (vide sub-section 29(2) of the Mental Disorders Act) of the special verdict prescribed by sub-section 29(1) of that Act is that the accused becomes a Governor-General's decision patient, the designation of that verdict as an "acquittal"is,

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perhaps, somewhat unhappy, even if, technically speaking, it be entirely accurate. No doubt some such considerations prompted DEVLIN J. to say in Regina v. Kemp (1956(3) A.E.R. 249 at page 251) that the special verdict "is best called a "qualified form of acquittal as distinguished from the abso- "lute acquittal which is all that is known to the common law." However that may be, the various considerations I have men- tioned show that the special verdict prescribed by section 29(1) of the Mental Disorders Act does not constitute a con- viction. Appellants were, therefore, not convicted in the courts a quo .

It was argued by Mr. Raftesath, for appellant Cele, that even if, contrary to his main sub- mission, the decision in Regina v. Adams (supra) renders con- viction a prerequisite to an accused's invoking the aid of section 366 of the Code, the sole underlying reason therefor lies in the circumstance that, unless he is convicted, the accused can not derive any benefit from the reservation of any question of law. In the present cases - so counsels' argu- ment continued - appellants would derive great benefit (to wit, release from detention as Governor-General's decision patients) should the points of law reserved, at their instance, by FANNIN J. be decided in their favour by this Court. Accord- ingly, so the argument concluded, this Court should now enter- tain/.....

-tain those questions. This argument is, I think, more attract-ive than sound. It pays insufficient regard to the fact that the provisions of sections 363, 364 and 366 of the Code - relating, respectively, to appeals, special entries and reservations - are, when invoked by an accused, all directed towards the same object, namely, the setting aside of a conviction or sentence (which latter can only exist if preceded by a conviction). The approach to this Court by an accused is, in each of the three procedures mentioned, conditioned by his having been convicted in a lower court. This requirement derives from the express wording of sections 363 and 364 (both of which in terms refer to conviction) and from the provisions of section 366 as interpreted by this Court in R@gina v. v. Adams (supra). See also the proviso to section 369(1) of the Code. As pointed out by SCHREINER J.A. in Regina v. Nzimande (1957(3) S.A.772 at pages 773 and 774), since the introduction of appeals from superior courts in criminal cases, the procedures by way of special entry and the reservation of questions of law have lost much of their former importance. All three procedures, when invoked by an accused, have, however, the same object in view namely, the setting aside of a conviction. When considering questions of law reserved under section 366 this Court is not, as it were, sitting in vacuo to consider possible

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grievances of persons who have been arraigned on a criminal charge in a lower court, but is exercising the statutory function prescribed by that section and by section 369 of the Code. Before an accused can invoke this statutory machinery, he must bring himself within the terms of section 366; and one of the things he must show is that he has been convicted. The appellants are unable to establish this essential pre-requisite. It is of interest to notice that a similar situation apparently obtains under the corresponding English Statutes, see Rex v. Taylor (1915(2) K.B. 709). In that case a special verdict had been found. Being desirous of bringing the matter before a higher court, the presiding judge, in an endeavour to avoid the effect of Rex v. Felstead (supra), stated a case and reserved a question of law under the Crown Cases Act 1848. This latter Act, however, prescribes that questions of law may be reserved "when any person shall have been convicted" and the Court of Criminal Appeal (LORD READING C.J., AVORY and LOW J.J.) consequently refused to entertain the questions of law reserved.

Before leaving this branch of counsel's argument, reference must be made to this Court's decision in Rex v. Holliday (supra). The accused in that case had, in consequence of a jury's verdict, been ordered to be detained as a Governor-General's decision patient. Certain

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special entries were, at the instance of the accused, made by the judge who presided at the trial. Because they did not relate to irregularities in the proceedings, those special entries were inept, but they were treated by this Court as if they were questions of law reserved. Felstead's case (supra) was mentioned in the judgment of this Court but no allusion was made, either in argument or in the judgment, to the accused's right to approach this Court on a question of law reserved. This is, I think, attributable to the fact that, as appears from the terms of the special entries to be found at the foot of page 253 of the report, the substance of the accused's complaint was that he had been convicted by the jury whose verdict had, he maintained, been wrongly interpreted by the presiding judge as a special verdict in terms of section 29 of the Mental Disorders Act. Hollidays's case is, therefore, no authority in favour of the present appellants.

It was also urged upon us as being highly anomalous that an accused in respect of whom a special verdict under section 29 of the Mental Disorders Act has been brought in should be without any redress by way of a resort to a higher court either in relation to the finding that he was mentally disordered at the time, or even in relation to his having committed the act charged as an offence as,

for instance, where a definite alibi is rejected by the trial court. As indicated above, however, the effect of section 182 of Act 56 of 1955 is to take the persons described in that section out of the operation of the ordinary criminal law and to cause them to be dealt with in the manner provided by the Mental Disorders Act. In terms of section 27 of that Act a person awaiting trial may, under the circumstances stated in the section, be ~~deemed~~ declared a Governor-General's decision patient even before arraignment. No appeal lies against such a declaration. Even Chapter I of the Act - which provides for the detention of persons who, without any suggestion whatever of criminal conduct on their part, are found to be mentally disordered - gives no express right of appeal against such detention, although provision is made for enquiries to be held under certain circumstances (vide sections 18, 19 and 20). Having regard to the foregoing, it is not so anomalous that an accused who has been the subject of a special verdict under section 29(1) should have no right of recourse to a higher court. It might be added that the existing system has worked for many decades. At the same time, having regard to the grave consequences for an accused which follow upon a special verdict, there is much to be said in favour of the introduction, subject to suitable safeguards, of a right of appeal against the special verdict prescribed by section 29 of the Mental Disorders Act. That, however, is a matter for the Legislature and not for this Court which must administer the law as it finds it.

Nor does the divergence of judi-

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-cial opinion reflected in Regina v. Mkize and Regina v. Mok-wanazi (supra) and in the present two cases afford any ground for this Court's entertaining the questions of law reserved. Should that divergence occasion difficulties in practice, the procedure envisaged by section 385 of Act 56 of 1955 might perhaps be invoked in order to resolve those difficulties.

In view of the various considerations I have mentioned, we reached the conclusion, stated at the commencement of this judgment, that section 366 of Act 56 of 1955 did not authorise the reservation of the questions of law and that this Court had no jurisdiction to consider them pursuant to the provisions of that section.

Counsel for appellants also advanced, as an alternative submission, the suggestion that the questions of law reserved should be considered by this Court under its extraordinary jurisdiction. Whether any such jurisdiction exists is a very doubtful question (see Regina v. Sibande, 1959(3)S.A.1 at page 4 (A)). Assuming, without deciding, that question in appellants' favour, it is sufficient to say that, after considering the evidence led at the trial in the present cases, neither would appear to warrant the exercise by this Court of any such extraordinary jurisdiction which, in the very nature of things, would be exercised - if

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at all - only in rare and exceptionsl circumstances.

Both cases were, accordingly, struck off the roll.

N O Grenie Thompson

a. H. R.

D. H. S.

J U D G M E N T: 12th June, 1959.

FANNIN, J: The charge against the accused is that on the 8th October 1958, he murdered his wife Pumapi Cele by stabbing her with an assegai. There is no dispute on the facts, and we are satisfied that the accused did cause the death of the deceased by stabbing her as alleged by the Crown. The circumstances of the killing were very extraordinary, and the killing took place in the presence of police officers, whose assistance had been called for by other members of the accused's family, in view of his threatening conduct. The Crown did not ask that the accused should be convicted of murder, but suggested that the proper verdict was the special finding provided for in section 29(1) of the Mental Disorders Act No.38 of 1916. Dr. Helman, who was the assistant Physician Superintendant of the Fort Napier Hospital from March to May of this year, and who had the accused under his personal observation from the 6th March to the end of May, 1959, was present in Court and heard the evidence. He expressed the view that, accepting the Crown evidence as to the circumstances of the stabbing and as to the accused's previous history, and having regard to his own observations, the accused was probably suffering from an epileptic equivalent at the time when he killed his wife and that he was at that time certifiable as mentally disordered or defective under the Mental Disorders Act. He said that a patient under an epileptic equivalent performs actions blindly, in a state of unconsciousness and without reason. We accept the Crown witnesses as to the killing and as to the accused's previous history. It is not necessary to set out the details of that evidence. We also accept Dr. Helman's views, and find that the accused while he did in fact kill the deceased by stabbing her, was at the time suffering an epileptic equivalent and was unconscious of what he was doing.

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