137/1959

G.P.-S.4706—1950-1—6,000. U.D.J./445.

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

(Cipuecate DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN KRIMINELE SAAK.

MHLOMULENI NGEMA
Appellant.

versus

THE QUEEN
Respondent.

Appellant's Attorney *Prokureur van Appellant*	*Respondent's Attorney* *Prokureur van Respondent*
Appellant's Advocate Wilson *Advokaat van Appellant*	*Respondent's Advocate* G. M. Brink. *Advokaat van Respondent*

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

(A)

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Coram: Ogilvie Thompson, Hamstottom, Botha, Holmes et Wessels JJA.

Appeal dismissed.

(Reasons later)

Interim

IN THE [illegible] COURT OF SOUTH AFRICA

(Appellate Division)

In the matters between :

1. [illegible] and [illegible]

and

2. [illegible] and [illegible]

Coram: Ogilvie Thompson, Rumbottom JJ.A., Rothe, Van Wyk et Holmes A.J.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 [illegible] 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 a

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

Appellant Ngema was charged in the Durban and Coast Local Division, before [illegible] 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.269(T.)) 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) 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. Mchwanazi (1959(3) S.A.782(W.)). At the

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request of defence counsel and acting pursuant to the provisions of section 368 of the Code, MAY IN 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 MAY IN 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 Appellant'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 automatic 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 learned trial judge, acting under section 29(2) of the Act, ordered 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, MARTIN 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 return the special verdict of finding provided for in section 29(1) of Act 33 of 1916."

In reserving the above stated questions of law MARTIN J. was fully aware that it had been decided by CARDINER J.J. 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). TRUTER 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. Tsena, 1959(3)S.A.648) 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 TRUTER 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. Solarana (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 consideration pursuant to the provisions of that section.

It this becomes necessary to determine 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 alleged 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 responsible 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 66 of 1965, is section 78 of Act 38 of 1916 which reads :

"78(1) When in any indictment, summons or other criminal charge 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 as to be 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."

Dealing with sub-section 78(1), it lays down that, where its introductory provisions are satisfied, the court etc. must return the "special verdict or finding" described in the subsection. The terms of that special 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 responsible 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 38 of 1902 (T). Those sections of the pre-Union statutes

mentioned were, in turn, virtually identical with section 2 of the English Trial of Lunatics Act 1883(46/47 Victoria Ch. 38). Sub-sections (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. Maclarty (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 indivisable; 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 DEWAL J. to say in Regina v. Kemp (1956(3) S.A.L.R. 249 at page 251) that the special verdict "is test 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. Heftesath, 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 cannot derive any benefit from the reservation of any question of law. In the present cases - as 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 FAGAN J. be decided in their favour by this Court. Accord- ingly, so the argument concluded, this Court should now enter-

-tain these questions. This argument is, I think, more attractive than sound. It pays insufficient regard to the fact that the provisions of sections 363, 364 and 366 of the Code - relating/8.
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 Regina v. Adams (supra). See also the proviso to section 369(1) of the Code. As pointed out by SCHREINER J.A. in Regina v. Neumande (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 grievances/.....

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 366 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. 708). 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. Polstead (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 [illegible] C.J., AVORY and LUSH 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, these special entries were inept, but they were treated by this Court as if they were questions of law reserved. Halstead'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. Halliways'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,

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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 87 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 28(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 Perins v. Mkize and Perira v. Nokwenari (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 these 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 1956 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.L.R. at page [illegible] (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 exceptional circumstances.

both cases were, accordingly, struck off the roll.

12th JUNE, 1959.

J U D G M E N T

REGINA versus MHLOMULENI NGEMA

FANNIN J: The accused is charged with the murder of his brother, Hlezinempi Ngema, on the 6th November, 1958. It was clearly established by the Crown, both from the admissions formally made on behalf of the accused by his Counsel, Mr. Wilson, and by the evidence led before us, that the accused did, on that day, kill the deceased by stabbing him with an assegai. The Crown however did not ask for a verdict of guilty of murder, but suggested that on the evidence, the proper course was for the Court to enter the special verdict provided for in Section 29 (1) of the Mental Disorders Act No.38 of 1916, that is to say a verdict to the effect that the accused "was guilty of the act or omission charged against him but was mentally disordered or defective .... at the time when he did the act or made the omission."

The Court has had the advantage of hearing the evidence of two medical practitioners, namely, Dr. Khan, the Superintendent of the Town Hill Mental Hospital and Dr. Fismer, who is a member of the staff of that hospital. Both were present throughout the trial, while Dr. Fismer also had the accused under his observation from the 14th to the 31st March, 1959. Both these doctors expressed the opinion that, accepting the evidence of the Crown witnesses as to the conduct of the accused during the two days before he stabbed the deceased, the probability is that he was not conscious of what he did and was mentally disordered within the meaning of the Mental Disorders Act at the time when he did it. Having seen and heard these witnesses, we are satisfied that they gave a true account of the accused's conduct, which was clearly grossly abnormal. The accused is a tribal constable and a man of standing in his community. Prior to this occurrence, he had a reputation for good sense and good judgment

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and was noted as a peaceful man who was respected by all. His two wives and the other members of his family who gave evidence all were obviously attached to him and were amazed at the extraordinary things which he did. It is unnecessary to recount the details of his conduct. We accept and adopt the views of the medical practitioners referred to and find that the accused was in fact mentally disordered at the time when he stabbed the deceased. Mr. Wilson, however, suggested that this was not a proper case for the special finding referred to in Section 29 of the Mental Disorders Act. He said that, on the evidence, the probabilities were that the accused's conduct and his mental state were the result of a fall which he had from his bunk in a train, when returning to his home from Durban two days before he stabbed the deceased. Dr. Fismer agreed that the immediate cause of the accused's mental state was probably this fall, although he did seem somewhat surprised that the symptoms were so severe. Dr. Khan was also inclined to agree that the probable immediate cause was concussion following the fall. Both doctors suggested however, that there might have been some other latent phenomena which were, as it were, sparked off by the concussion following the fall. Dr. Fismer, for example, said that he suspected the possible existence of a latent psychosis which was revealed by the head injury. Dr. Khan suggested the possibility of epilepsy. Mr. Wilson contended that it is clear that the accused has now recovered and that the accused's mental condition at the time, while exempting him from responsibility for the act which he committed, was not caused by any mental defect or disorder within the meaning of the Mental Disorders Act. He suggested, for example, that a person who receives a mild concussion during a game of rugby and who thereafter, for a brief period, performs acts of which he is unconscious and of

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which he has no recollection, cannot properly be described as mentally disordered, and so subject to Section 29 (1), even if one or more of his acts would otherwise have been criminal. This proposition of Mr. Wilson's is, I suppose, one which raises questions both of law and of fact. It may well be that a transitory aberration resulting from a blow on the head cannot properly be described in medical parlance as a mental disorder, and it may also be that upon a proper construction of the Act, the phrase "mental disorder or defect" could not be considered to cover such a case. But I think it is unnecessary to enter upon this question, for there is evidence in this case, which the Court accepts, which indicates that the accused's mental condition was not merely transitory but persisted for a considerable time. The conduct spoken to by the witnesses continued for two full days and culminated in acts of violence. Thereafter when seen by his relatives while under arrest, he was sometimes depressed and withdrawn and unwilling to converse with them, while on other occasions he seemed perfectly normal. Furthermore, when Dr. Fismer observed him between the 14th and 31st March, 1959, some five months after the stabbing, he still displayed symptoms of mental disorder, which resembled those spoken to by the members of his family. It is true that subsequently Dr. Schulman, the acting Physician Superintendent of the Town Hill Hospital, on the 12th April, 1959, stated that he was unable to certify him as then being mentally disordered or defective, within the meaning of the Act, and said that he was fit to stand his trial. But Dr. Fismer was not disposed to agree that the accused, who was peaceful and quiet when he saw him on the day upon which he gave evidence, had now apparently recovered, although he agreed that the accused's symptoms might well never reappear. On the facts as established at the trial therefore, the accused was, at the time he committed the

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act of killing his brother, as the immediate result probably of a blow on the head, in an abnormal state of mind so as to be unable to know or understand the nature or the quality of his acts. That condition persisted in greater or less degree for a period of five months. On those facts the Court is satisfied that the accused was mentally disordered within the meaning of the Act at the time when he killed his brother and that, subject to what follows, the words of section 29 (1) are satisfied.

Mr. Wilson's second argument turns upon the true effect of section 29 (1) of the Mental Disorders Act No.38 of 1916. That subsection reads as follows:

> "When in any indictment ... any act or omission is alleged against any person as an offence, and evidence (including medical evidence) has been given .... 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 occurred, then, if it appears ....., 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, ... 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."

In the Dutch version of this section the words "act or omission" are translated (I use this word advisedly for the signed version is in English) as "daad of nalating", while the words "een misdaad" are used for "an offence". Finally, the special verdict or finding required when the subsection is satisfied is referred to as follows:

> "Een speciale uitspraak .... ten effekte dat beschuldigde de daad of nalating hem ten laste gelegd, begaan heeft, maar dat hij ten tijde van het begaan daarvan, geestelik gekrenkt of gebrekkig was als voorzegd."

Mr. Wilson, relying upon the judgment of Jansen J. in Regina v. Mkize 1959 (2) S.A.260, in this Court, argued that section 29 (1) did not apply in this case because the evidence disclosed that the accused's condition was such

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that he was incapable of forming the intent to kill or to do bodily injury to the deceased, and was thus not "guilty of the act charged" within the meaning of section 29 (1).

As was pointed out in Mkize's case (at page 260), before the special verdict can be returned, it must appear to the Court -

i) that the accused "did the act or made the omission charged", and

ii) that the accused was "mentally disordered or defective" at the time, and

iii) that as a result of that mental state the accused was not "responsible according to law for the act or omission charged".

I agree, with respect, that the phrase "mentally disordered or defective" is used as defined in section 2 of the Act. The third requirement imports the common law rules as to the responsibility of a mentally disordered person for acts or omissions which would otherwise be punishable as offences. So that section 29 (1) requires that the accused should be both "mentally disordered or defective" within the meaning of the Act, and also "not responsible", owing to his mental condition, at common law. In this case both these requirements are satisfied and the sole question is whether the accused "did the act or made the omission charged", in the sense in which those words are used in section 29 (1). It is clear that the accused did inflict the fatal wounds upon the deceased, and therefore that he did kill the deceased, which is the physical act which is alleged in the indictment. Mr. Wilson's point, however, is that the "act" referred to in the subsection is the offence with which the accused is charged and not the mere physical act of killing by stabbing. This is the view taken in Mkize's Case (at page 260F). With great respect I cannot take this

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view of the subsection, for the reasons which follow. In the first place, it seems to me that throughout the subsection there is recognized a distinction between the "act or omission" and the "offence". The opening words provide that it shall apply when an act or omission is charged "as an offence". The subsection goes on to provide that if, on the trial of the accused "for that offence", it appears that he "did the act or made the omission" (not, be it noted, "committed the offence") but, owing to mental disorder or defect, "was not responsible" in law for the act or omission charged, the special verdict must be brought in. In order that a physical act should constitute an offence, something more than the mere act must be proved. The act must always be shown to have been voluntary and frequently to have been intended to achieve a particular result, both of which requirements I would be inclined to regard as comprehended by the technical phrase "mens rea". When the subsection refers to an "offence", it means, in my view, the physical act plus the necessary mental element which together, in law, make up the offence. It follows that when it refers to the accused being found to have "done the act or made the omission" but not being responsible in law, it seems to me that what is meant is a situation where the physical act is proved, but the elements of voluntariness or intent, or both, are absent on account of the accused's mental disorder or defect. It is this absence of voluntariness or intent which, at common law, would result in a finding of not guilty and the discharge of the accused. And, in my view, it was the discharge of a person who, through mental disorder or defect, has committed such an act, dangerous to or at least disruptive of, an ordered society, which section 29 was designed to prevent. It is true that, in the English version, the special verdict

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or finding is required to be "to the effect that the accused was guilty of the act charged against him", but the use of the word "guilty" does not, in my view, necessarily impart the idea of being guilty of an offence - though the use of the word is perhaps unfortunate. But if one turns to the Dutch version the corresponding words are that the accused "de daad of nalating .... begaan heeft", and these words, especially if read in a context in which the "offence" is referred to as "misdaad" and the "act" as "de daad", convey the idea that, where the subsection is satisfied, the accused is to be found to have committed or perpetrated the physical act charged in the indictment, but to be not responsible in law (and so guilty of no offence) by reason of mental disorder or defect. This special verdict is equivalent to a verdict of "not guilty" - see R. v. Young 1949 (3) S.A. 1199. I cannot, with respect, agree with the fears expressed in Mkize's case (at page 255 G/H) that a mentally disordered person would be placed in a worse position than a normal person in the two hypothetical cases there referred to. In the case of a mentally disordered person who instinctively kills in self-defence the proper verdict would, in my view, be "not guilty", and not the special verdict under section 29 (1). That is so because the killing would be justifiable in the circumstances, and the accused would be excused, not because of his mental condition, but because of the justification of his act provided by the danger in which he stood. The epileptic who, in a seizure, falls and breaks a window, could never be found to have "done the act" involved in a charge of malicious injury to property, any more than a sane person, who unwittingly walks into a window, could be convicted of that offence. While I agree that, in legal parlance, it is difficult to envisage a person "doing" anything

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while unconscious (Mkize's case, page 260 D), I take the view that the word "did" in subsection 29 (1) is not used in a strict "legal" sense, but rather in a more popular looser sense. In that sense a wholly unconscious epileptic who stabs a person, can properly be said to have "done" the act of stabbing, but he cannot be said to have "done" any act if he falls down, and in falling causes some hurt or damage to another. Reference must now be made to R. v. Schoonwinkel 1953 (3) S.A. 136, which is cited in Mkize's case. There, apparently, the accused had an epileptic fit while driving a motor car. While in the fit he drove the car for some 30 paces on the wrong side of the road, collided with another car and killed a passenger in that car. It was held that the accused was not mentally disordered or defective at the time so as to be a danger to himself and others, within the meaning of Class 7 of section 3 of the Mental Disorders Act. With such a finding of fact, the special verdict under subsection 29 (1) was clearly incompetent. If the evidence had shown that the accused had, while under the influence of an epileptic fit, unconsciously driven his car at a dangerously high speed through a busy street, the finding of fact may well have been different. But Schoonwinkel escaped the special verdict because he was not mentally disordered, and not because he was shown to have been incapable of a voluntary act which was, however, the reason why he escaped conviction. The case does not, I think, support the views expressed in Mkize's case as to the meaning of the words "the act charged" in section 29 (1). Nor do I think that R. v. Victor 1943 T.P.D. 77 (wrongly referred to in the report of Mkize's case as 1942 T.P.D.) conflicts with the view I have expressed. In that case, while the accused was probably mentally disordered or defective when he drove

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his car in a dangerous manner, he was held to be, nevertheless, responsible in law for the act charged against him, because he commenced to drive the car when he knew he might suffer an epileptic fit and lose control of it as a result. The third requirement of subsection 29 (1) was therefore absent. In the other case, referred to in Mkize's case as being in conflict with the views I have expressed, namely R. v. du Plessis 1950 (1) S.A. 297, the accused was held to be entitled to be found not guilty because the probabilities were that he was unconscious when he did the act charged, but the questions as to whether he was mentally disordered at the time, and whether section 29 (1) applied, do not seem to have been considered. The accused did not therefore appear to the Court, it seems, to have been mentally disordered within the meaning of the Act, at the time of the alleged offence. For all these reasons, I find myself, with respect, unable to follow Mkize's case. I prefer to follow the judgment of Brokensha J. in R. v. Kumalo 1956 (3) S.A. 238, another decision of this Court.

On the facts found by the Court in this case, therefore, the proper verdict is that the accused is guilty of the act charged against him but was, at the time when he did the act, mentally disordered, so as not to be responsible according to law for such act, and he is accordingly ordered, in terms of section 29 (2) of Act No.38 of 1916, to be kept in custody in some prison or gaol pending the signification of the Governor-General's decision.
