

CUTHBERT KHUMALO v THE PEOPLE (1981) Z.R. 136 (S.C.)

SUPREME COURT
GARDNER, AG. D.C.J., CULLINAN, J.S. AND MUWO, AG. J.S.
11TH AUGUST, 1981
(S.C.Z. JUDGMENT NO. 14 OF 1981)

Flynote

Evidence - Medical report - Statement of accused contained in psychiatrists' report - whether can be used as evidence against accused .

Headnote

The appellant was convicted on two counts of murder. The prosecution evidence was that on the evening in question the appellant went to a hut in which the two deceased persons together with four others were sleeping and fired an automatic gun, killing the two deceased and wounding four others. The appellant's defence was that he was a freedom fighter lawfully carrying an automatic weapon.

In considering whether or not it was possible that the appellant's story that the gun slipped from his shoulder as he entered the low doorway of the hut was true, the learned trial judge referred to a psychiatrist's report which had been called for at an earlier stage in the proceedings to ascertain the mental state of the appellant.

Held:

- (i) Reference to the appellant's statement in the psychiatrist's report was improper and was a serious misdirection. A psychiatrist's report in these circumstances, is relevant only to the mental condition of an accused person. It may not be used as evidence relating to guilt.

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For the appellant: W. Henriques (Miss) Assistant Senior Legal Aid Counsel,
For the respondent: L.S. Mwaba, State Advocate, .

Judgment

GARDNER, AG.D.C.J.: delivered the judgment of the court.

The appellant was convicted on two counts of murder, the particulars of the charge being that, on the 8th of November, 1978, at Livingstone, he murdered Mukanjeki Namwala and Gloria Makwembo.

The prosecution evidence was that on the evening in question the appellant went to a hut in which the two deceased persons together with four others were sleeping and fired an automatic gun, killing the two deceased and wounding four others. The appellant's defence was that he was a freedom fighter lawfully carrying an automatic weapon; that he had a girl friend (PW.1) in the hut and he was visiting her. In the course of entering the low door of the hut the gun slipped off his shoulder and, as he tried to catch it, he accidentally touched the trigger, with the result that the whole magazine of thirty rounds was fired. He maintained that the safety catch of the weapon must have been accidentally knocked into the unsafe position while he was travelling through the bush. There was expert evidence that this particular type of weapon had three firing positions; one of which was single shot, another bursts and the third fully automatic. The expert evidence was that if the gun was set on fully automatic one pull of the trigger would release the whole magazine. It was in these circumstances that the appellant put forward his defence of accident.

It was essential for the learned trial judge to consider whether or not there had been an accident or whether the appellant's action was deliberate. In doing so he meticulously examined the whole of

the evidence including the credibility of the various witnesses who referred to the appellant's previous knowledge of the girl in the hut whom he said was his girl friend.

In considering whether or not it was possible that the appellant's story that the gun slipped from his shoulder as he entered the low doorway of the hut was true, the learned trial judge referred to a psychiatrist's report which had been called for at an earlier stage in the proceedings to ascertain the mental state of the appellant.

In the psychiatrist's report the doctor set out the explanation given to him by the appellant as to how the accident occurred, and the learned trial judge found that this was contradictory to other statements made by the appellant and to the appellant's own evidence. He found that, according to the statement referred to in the psychiatrist's report, the gun would have fallen in the opposite direction and the bullets would have gone behind the appellant outside the hut.

The learned State Advocate, Mr Mwaba, on behalf of the State, has very properly conceded that the reference to the appellant's statement in the psychiatrist's report was improper, and was a serious misdirection,

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and the State does not support this conviction. A psychiatrist's report, in these circumstances, is relevant only to the mental condition of an accused person. It may not be used as evidence relating to guilt.

We agree that the learned trial judge decided that the contradictory psychiatrist's report was of importance in considering the possible success of the defence of accident, and this conviction can only stand if we can apply the proviso to section 15 (1) of the Supreme Court Act. In the whole of the rest of the evidence we are quite unable to say that it is sufficient to justify our finding that any reasonable court must have convicted despite the misdirection.

The appeal is allowed, the conviction is quashed, and the sentence is set aside.

Appeal allowed
