IN THE HIGH COURT OF SWAZILAND

In the matter between: CRI. T. S. 9/78

VS.

1. ZEPHANIA SITHOLE

2. PHILLIP MALATI

3. ELIAS MTHEMBU

CORAM : O. J. M. NATHAN, CHIEF JUSTICE

FOR CROWN: MR. D. MATSE

FOR DEFENCE: MR. G.M. LANDMARK

JUDGMENT

(Delivered on the 15th March 1978)

NATHAN. C. J. M.:

On Count 1 Nos. 1 and 2 Accused are charged with the theft from Mr. Victor De Oliviera of the sum of E10000 on 11 th September 1977. There is an alternative charge of fraud.

On Count 2 Nos. 1 and 3 Accused are charged with the theft from Mr. Christopher Scott-Long of the sum of E16000 on 12th November 1977. There is, again, an alternative charge of fraud.

I will deal separately with the two counts.

COUNT 1

Mr. Victor de Oliviera, the managing director of a panel beating works, told the Court how he was approached in August 1977 by one John Dlamini and another person who called himself Japhtha (really No.2 Accused). They said they had gold coins for sale. These were mainly Kruger Rands. On a subsequent occasion they produced some of these and some R2 gold coins. The price which they asked for those was considerably below market value and eventually a figure of R100 per coin was agreed upon. Subsequent meetings and discussions took place and on one of these Mr. de Oliviera was introduced to No.1 Accused who called himself Solomon. A meeting was eventually arranged to be held at a place called Ngogolo. De Oliviera went there with two friends, the brothers Helwick. It is unnecessary

to describe everything that happened there. De Oliviepa met John Dlamini and Nos.1 and 2 Accused. De Oliviera produced R10000 in notes and it was counted out. Nos. 1 and 2 Accused took the money away with them saying they were going to fetch the key of a box which allegedly contained the gold coins. They did not return. John Dlamini and one Sampson remained with the box. Suddenly John grabbed the box and made away with it. De Oliviera and the Helwicks tried to give chase, but their car ran into a ditch and they had to remain there that night. The next day in Manzini de Oliviera accidentally ran into No.2 Accused, and asked him for his money. No.2 Accused said he did not know de Oliviera. A scuffle took place; the police arrived and arrested No.2 Accused. The events at Ngogolo had been witnessed by a guard or night watchman named Khopo Vilane.

On the 14th September 1977 2 identification parades were held at Manzini and at each de Oliviera

identified No.1 Accused who had called himself Solomon. No.2 Accused was also on the parades, but De Oliviera did not identify him. His reason for not doing so was the that he knew No.2 Accused and had been present when he was arrested. I regard this as a satisfactory explanation. He was, incidentally, only asked to identify No.1 Accused on the parades.

Khopho Vilane identified No.2 Accused at an identification parade at which de Oliviera was not present. When he was asked in Court whether he recognised any of the people he had seen at Ngogolo he took a cursory glance round and replied in the negative. I arranged for an identity parade to be held then and there in Court, pointing out that the suspect was not necessarily on the parade. khope of Vilane at once approached No.2 Accused, who had been wearing spectacles, and asked him to open his mouth ans show his teeth. He immediately identified No.2 Accused. No.2 Accused has a gap in the middle of his front upper teeth. Vilane said he had specially remembered this when he saw the man at Ngogolo.

I should mention that No.1 Accused was also on the identification parade held by the Police attended by Vilane and the one held in Court. He also has a gap in his upper teeth, slightly smaller than that of No.2 Accused. But he was not identified by Khopo Vilane at either parade. I am satisfied beyond any reasonable doubt that No.2 Accused, who was the person arrested by de Oliviera, was one of the persons whom Vilane remembered having seen at Ngogolo.

Mr. Landmark for the defence objected to the holding of the identification parade in Court on the ground that it might prejudice the Accused. Apart from the warning I gave in this regard, there is in my view no substance in this objection; as I pointed out, the Court identification might just as well have operated to the benefit of the Accused as to their detriment.

To complete the narration in regard to the identification parades, Khopo Vilane's wife failed to identify either No.1 Accused or No.2 Accused at a police identification parade that she attended.

Neither No.1 Accused nor No.2 Accused gave any evidence in defence. The Crown has made a very strong prima facie case in regard to Count 1 and apart from some peripheral evidence in regard to the identification parades there has not been the slightest attempt to answer it, I have no hesitation in finding Nos, 1 and 2 guilty on Count 1.

COUNT 2. The complainants on this Count are Mr. Christopher -Scott-Long, and his brother Robin Scott-Long, who keep a night club in Mbabane. Christopher Scott-Long related how one Zulu had taken him in October 1977 to the house of No.3 Accused in Manzini where he met No.3 Accused, his wife and No.1 Accused who called himself Dlamini. After further meetings with Nos.1 and 3 Accused it was arranged that he should by Kruger "ponds" and other gold coins from them. Here the price was far lower than it had been in Count 1 - 400 coins for E15,700, Dlamini getting a commission of E300.

It was arranged that the sale should be concluded on a Friday afternoon, 11th or 18th November 1977. After an abortive visit that day Christopher Scott-Long and his brother went the following day to the house of No,3 Accused where they met No.3 Accused, his wife and No.1 Accused. A Mrs. Dlamini who never materalised was supposed to be doing the actual selling. Christopher Scott-Long said they took E16,000 which was done up in 8 stacks of E2,000 each in R10 notes out of the boot of their car. This was counted, and the E300 was given to No.1 Accused as agreed. The alleged Mrs. Dlamini's son brought a box of coins and Christopher Scott-Long sat at a table and started looking at these. The door of the room was flung open and two people who said they were policemen said they were looking for dagga and gold. They proceeded to "rough the room up". A

scuffle developed between Robin Scott-Long and one of these two men, in which Christopher intervened. While he was doing this, No.3 Accused ran out of the door with the money, followed by Mrs. Dlamini's son and No.1 Accused with the box of coins. The one alleged policeman held the door shut from the outside

while the others got away. The Scott-Longs gave chase, but without success.

At an identification parade in Manzini, Christopher Scott-Long identified Nos.1 and 3 Accused.

Robin Scott-Long gave very similar evidence and he identified Nos.1 and 3 Accused at an identification parade held before that at which Christopher Scott-Long made his identification.

There were a couple of minor discrepancies between the versions given by the two Scott-Longs - for example Robin said the. Notes were made up in bundles of E1000 and not 2000 each, and he said the bogus policeman claimed to be searching for dagga and diamonds, not dagga and gold. But in all material respects their versions tallied exactly. Robin Scott-Long did not see the actual notes, nor did he see the R300 being handed to No.1 Accused; but this might have taken place while he was outside relieving himself.

The defence contented itself with referring to the minor discrepancies in the evidence of the Scott-Long brothers that I have referred to, and to a faint attempt to suggest that they were under the influence of liquor and could not have seen or remembered all that they testified to. There was no real attack upon the identification. As in Count 1 neither" of the Accused attempted to give evidence, and even No.3 Accused's wife who was at the scene of the crime was not called. The only explanation offered of their failure to testify was that this would have subjected No.2 Accused to cross-examination on Count 2 with which he was not charged. This is indeed the position: it may work unfortunately for accused persons in certain circumstances; but this is time-honoured practice. It certainly cannot excuse an accused from testifying in regard to offences with which he has been charged. I would only add that no application was made for a separation of trials. I am not suggesting by saying this, that an application for separation would have been granted had it been made.

5

The guilt of Nos.1 and 3 Accused on Count 2 is fully established "beyond reasonable doubt. The amount stolen should, however, be R15,700 and not R16,000 in view of the payment to No.1. Accused of R300 commission which, of course he had not earned.

Nos.1 and 2 Accused are found guilty of the theft of R10,000. Nos.1 and 3 Accused are found guilty of the theft of R15,700.

JUDGMENT ON SENTENCE

Nos.1 and 2 Accused have been found guilty on Count 1 of the theft of R10,000 and Nos.1 and 3 Accused have been found guilty on Count 2 of the theft of R15,700.

I have very little sympathy with the complainants in either case. But it is a very moot point whether their cupidity and participation in what they must have known to be extremely shady transactions can operate to the benefit of the Accused by way of mitigation. The very cupidity and readiness to participate to which I have referred are in no small measure induced by the malpractices of persons such as the Accused, ever on the look out for willing dupes and fences.

In my opinion heavy sentences are called for as a protection to society. I take into account that the sum involved on Count 2 was considerably more than in Count 1. There is, however, no reason why the Accused should be permitted to get away with their illgotten gains ; and in order to induce them to make repayment I propose to suspend a portion of the sentences on condition that restitution is made. No.1 Accused has a clean record, but he has been convicted on 2 counts involving large sums of money and he must be given fairly heavy sentences on each count.

No.2 Accused has a clean record in regard to this type of crime, but he has been declared a prohibited immigrant in Swaziland. There is no reason to treat him any differently from No.1 Accused on the count on which he has been convicted; but I take this opportunity of recommending that he be deported after he

has served his sentence. Swaziland does not need such people.

6

No.3 Accused has a previous conviction for attempted robbery in 1970 for which he received 18 months imprisonment. I think I must take this into account and impose a slightly heavier sentence on him on Count 2 on which he has been convicted than on No.1 Accused on the same count.

On Count 1, Nos.1 and 2 Accused will each be sentence to 4½ years imprisonment. But for every E1000 that either of the Accused pays to the Registrar of this Court within 2 months of today's date for payment to Mr. De Oliviera six months of the sentence on the Accused so paying will be suspended for 3 years on condition that he is not convicte of any offence of which theft is an element, committed during the period of suspension.

On Count 2, No.1 Accused will be sentenced to 5½ years imprisonment and No.3 Accused to 6 years imprisonment. But for every E1000 that either of the Accused pays to the Registrar of this Court within 2 months of today's date for payment to Mr. Christopher Scott-Long six months of the sentence on the Accused so paying will be suspended for 3 years on condition that he is not convicted of any offence of which theft is an element, committed during the period of suspension.

Any payment by No.1 Accused in terms of these conditions is to be apportioned as between Mr. De Oliviera and Mr. C. Scott-Long in the proportion 500; 785.

The sentences on No.1 Accused will take effect cumulatively.

The effect of these sentences; disregarding any payments that may be made, is that No.1 Accused will serve a total of 10 years imprisonment , No.2 Accused 4½ years imprisonment and No.3 Accused 6 years imprisonment."

In addition Nos.1 and 2 Accused are ordered jointly and severally to pay to the complainant Mr. V. De Oliviera the sum of R10,000.

The conditions of suspension of the main sentences are without

7

prejudice to the rights of Mr. De Oliviera to take such action as he may be advised to recover these amounts.

C. J. M. NATHAN.

CHIEF JUSTICE