IN THE HIGH COURT OF SWAZILAND.

In the matter between: CRI. T. S. 52/78

REX

vs.

JOSEPH MSINDAZWE MNGOMEZULU

RICHARD MALINGA

JOHN MWELASE @ ENOCK ZULU

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

FOR CROWN: MR. A. HASSANALI

FOR DEFENCE: MR. M. SHONGWE

RULING I : RECUSAL

(Delivered on 31 May 1978)

Nathan, C.J.:

The Accused in this case are charged on two counts with the unlawful possession in Swaziland of arms of war and ammunition in contravention of the provisions of the Arms and Ammunition Act No.24/1964 as amended.

At the inception of the trial Mr. shongwe who appeared for the Accused asked me to recuse myself on the ground that the evidence will be to the effect that the Accused are freedom fighters and have dedicated themselves to the cause of liberating the Africans in the Republic of South Africa. He submits that I might be prejudiced by this evidence and that it is a known fact that I come from the Republic of South Africa. He went on to say that as the arms would be used against the whites in the Republic of South Africa I might be prejudiced in trying this case.

I have given the application careful consideration but have come to the conclusion that there is no substance in it.

office When I assumed/as Judge and later Chief Justice of the High Court of Swaziland I took an oath that I would well and truly serve His Majesty, his heirs and successors in such

office and that I would do right to all manner of people according to law without fear or favour, affection or goodwill.

That oath is still binding on me and my conscience.

The charge in the present case is of unlawful possession of the Arms of War and Ammunition in Swaziland, and the question of the use to which it was intended to put these Arms of War and Ammunition is irrelevant to that charge, although it might conceivably have some bearing on sentence if the Accused are convicted. But I should point out that even if this trial were taking place in the Republic of South Africa an application for recusal of the Judge trying the case would inevitably fail. There are many cases in the Republic of south Africa where the Accused have been charged with attempting to overthrow the

Government or with other treasonable acts and it has never been suggested - nor could it validly be suggested - that the Judge trying the case should recuse himself because he might be prejudiced. a fortiori is this the position where the trial takes place before a Judge in Swaziland, no matter what his origins may be.

It was pointed out in the judgment of the Appellate Division in R. v. T., 1953 S.A.479(A.D.) at p.483 that "In the case of a trained judicial officer the mere possibility of bias not based on a previous extra-judicial opinion in relation to the case he is going to try or on hostility or relationship or to intimate friendship with one of the parties or on an interest in the case does not disqualify him from trying the case."

This passage was quoted in the case of S. v. de Vries 1964(2) S.A.110(E), and referred to in S. v. Bam, 1972(4) S.A. 41(E) at p. 43. In Barn's case it was said "Likelihood, in this regard, is neither the same as a mere possibility of bias, nor is it to be equated with certainty of bias."

Mr. Shongwe relied on these two decisions, but the facts in them were very different from what has been submitted to me in the present application. Mr. Shongwe suggested that I or one of my near relations might fall a victim to terrorist activities and that in consequence I might be biassed or prejudiced against the Accused. But as the Director of Public Prosecutions pointed out, this is no more than a possibility - I venture to suggest a remote possibility at the present time - and this is not sufficient.

For these reasons I refuse the application to recuse myself.

RULING II : POSTPONEMENT

At the conclusion of the Crown case Mr. Shongwe for the defence sought a postponement of 6 weeks in order to enable him to lead evidence to the effect, broadly speaking, that the Accused are freedom fighters engaged in a struggle to liberate the Africans in the Republic of South Africa from the regime in that country and that the arms and ammunition were destined to be used in furtherance of that object. This, so it was submitted, has the blessing of the Organisation of African Unity, of which Swaziland is a member.

I should mention that it appears that this defence will affect only Accused Nos. 2 and 3.

In my judgment in an application that I should recuse myself in this trial I pointed out that the charge is one of unlawful possession of the arms and ammunition in Swaziland and that the question of the use to which it was intended to put these was irrelevant to the charge, although it might conceivably have some bearing on sentence in the event of the conviction of the Accused. I

nevertheless indicated that I would be prepared to consider the application for a postponement if I was furnished with an affidavit stating exactly what witnesses it was desired to call and what evidence they would give.

Such an affidavit by Mr. shongwe has now been filed, and I will deal in some detail with the contents thereof.

In pars. 2 and 3 he explains that he was briefed at a late stage. He was, however, afforded an opportunity of consulting with the Accused and taking instructions from them, in par. 7 it is stated that some witnesses whom the defence wishes to call are in custody at Matsapha Central Prison and that Mr. shongwe has been informed by the Commissioner of Prisons that he will first seek the authority of the Prime Minister before he can be allowed to interview them.

The affidavit does not indicate who these proposed defence witnesses are, or what they will say. It does

not even indicate what they would be asked to say.

Mr. shongwe in argument elaborated this paragraph by reference to par. 10 in which it is said that Mr. Joseph Mkhwanazi of Matsapha Central Prison will give evidence to the effect that the Accused were in transit through Swaziland. In this regard Mr. Hassanali, the Director of Public Prosecutions who is appearing for the Crown in this prosecution has stated that he will not seek to controvert that the Accused were in transit through Swaziland. It appears to me that this evidence can just as well be given by the Accused themselves as by Mr. Mkhwanazi.

In par. 8 it is alleged that other witnesses that the defence wishes to call are high ranking civil servants

who have attended meetings of the Organisation of African Unity on the question of South Africa, "and these officers will inevitably include the Prime Minister of Swaziland who is the Head of State and the only person recognised at O. A. U. meetings to represent the kingdom."

I point out in regard to this that, with due respect to the Prime Minister, he is not the Head of State. Furthermore, if he is the only person recognised at O. A. U. meetings to represent the kingdom, it is difficult to see what evidence any other "high ranking civil servants" can give. I draw attention to the fact that the nature of the evidence that the Prime Minister will give or will be asked to give - he has obviously not yet been approached -is not set out. There is a further difficulty of importance in this connection, namely that Mr. Hassanali has informed the Court that the Prime Minister, and probably any other civil servant that may be called, is likely to invoke state privilege in regard to the matters upon which evidence is sought, and it is likely that the Court would be obliged to uphold such a plea.

In pars. 9 and 10 of Mr. Shongwe's affidavit it is alleged that it is desired to adduce documentary evidence from Dar-es-Salaam in Tanzania and photocopies of some of the relevant evidence are attached to the affidavit. These, save for giving expression to the feelings of the O. A. U. and its member states in regard to the so-called apartheid regime in the Republic of South Africa and commending the participation of its member states in combatting this system, and calling upon them to assist in the struggle, really appear to me to take the matter no further. No details of the further resolutions or witnesses from Dar-es-Salaam whom it is proposed to call are given.

It is further stated in these paragraphs of Mr. Shongwe's affidavit that it is the intention of the defence

to lead evidence to the effect that the 2nd and 3rd Accused are freedom fighters and members of the Liberation Forces of the O. A. U. (who will use?)arms and ammunition (of ?) the O. A. U. (and?) proceed to the Republic of South Africa to conduct an armed struggle for the eradication of apartheid. Further that the Accused were trained in Tanzania, and that the accused and the weapons they had in their possession will be identified.

Here, again, Mr. Hassanali stated that he would not seek to controvert any of this evidence.

In par. 11 of Mr. Shongwe's affidavit it is alleged that one Mr. P. z. Mhlongo of Dar-es-Salaam will produce documents to show that the Swaziland Government is a member of the O. A. U. and that it has endorsed the Liberation Force and the Armed struggle against the Republic of South Africa. How Mr. Shongwe can state on affidavit that Mr. Mhlongo will say this I do not know. It appears to me that the most Mr. Shongwe was entitled to say was that Mr. Mhlongo would be approached to say it, which is a very different matter.

It is said that Mr. Mhlongo will also give evidence to the effect that the arms and ammunition belong to the Swaziland Government from its membership of the O. A. U. and that through the resolutions passed at the O. A. U. the 2nd and 3rd Accused are authorised by the Swaziland Government to possess the arms and ammunition and that Swaziland being one of the front line states has approved that liberation forces

may be stationed in the country although in the case of Swaziland this has to be done secretly as Swaziland is still dependent mainly on goods from the Republic of South Africa for its survival.

I can find no support in the Resolutions annexed to Mr. Shongwe's affidavits for these allegations. Even

if there are further resolutions which bear on the question it appears to me that there is nothing in the municipal law of Swaziland which incorporates such resolutions as part of the law of Swaziland. This Court can only administer the law as it finds it. If there are circumstances rendering it desirable or expedient that clemency should be extended to the Accused this is a matter which must be approached politically through the Government; but, without prejudging the final result, it does not appear to me that there are any legal considerations which the Court is entitled to take into account, save, as I have already mentioned, in so far as the matters sought to be raised may have a bearing upon the appropriate sentence to be passed. But evidence will not be required for this purpose; and Mr. Hassanali did not contend to the contrary.

I have dealt comprehensively with the various matters urged in Mr. Shongwe's affidavit and submitted by him in argument. None of them in my view warrant the grant of a postponement of this trial.

The application for a postponement is refused.

RULING III : FURTHER POSTPONEMENT

After Accuseds Nos. 1, 2 and 3 had completed their evidence Mr. Shongwe for the defence sought an adjournment to enable him to procure two further witnesses, Mr. J. Mkhwanazi and Mr. Ndhlovu, both of whom are being detained in Matsapha Central Prison. Mr. Shongwe stated that he had issued subpoenas against these two persons, but had received no returns of service in respect thereof.

The application was opposed by Mr. Hassanali who submitted that the procedure followed had been incorrect. He referred to Sections 31(1) of the Prisons Act 40/1964

and Section 205 of the Criminal Procedure and Evidence Act No.67/1938 which make it clear that the attendance at a trial of persons confined in prison can only be ordered by the Court, and is not a fitting matter for the issue of a subpoena.

Mr. Hassanali further pointed out that in the affidavit submitted by Mr. Shongwe in the course of his original application for a postponement he made mention only of Mr. Mkhwanazi and did not mention Mr. Ndhlovu. I had, as appears from my judgment on that application, required Mr. shongwe to state on affidavit what persons he wished to call, and what they would say.

That affidavit states that Mr. Mkhwanazi "will give evidence" to the effect that the accused were in transit through Swaziland. It appears to me that Mr. shongwe was not entitled to depose to this as he has not even seen Mr. Mkhwanazi. However that may be, Nos. 2 and 3 Accused have themselves testified to the effect that they are freedom fighters in transit to the Republic of south Africa to take part in the conduct of the War of Liberation on behalf of the Organisation of African Unity; and Mr. Hassanali stated in the course of the earlier application that he did not wish to controvert this. In these circumstances I am of the opinion that Mr. Mkhwanazi's evidence can carry the matter no further.

So far as Mr. Ndhlovu is concerned, Mr. shongwe has not seen him either and he had some difficulty in saying exactly what it is to which it is desired that he should testify. If his evidence would be designed to show that the Accused are in transit to South Africa, this is quite unnecessary. If it is designed to show that Swaziland as a member of the O. A. U. is sympathetically disposed to freedom fighter such as the Accused, I can only say, as I did in my earlier judgment, that this Court must administer

the law as it finds it. But I may add that the very fact that the present prosecution was instituted at all casts doubt upon what is alleged to be the attitude of the Swaziland Government.

For these reasons I refuse the application for an adjournment and decline to make any order for the attendance of the proposed witnesses.

JUDGMENT

(Delivered on the 6th June 1978)

The three Accused are charged firstly with the unlawful possession in Swaziland of Arms of War in contravention of Section ll(l) of Act 24/1964 as amended, and secondly with the unlawful possession of ammunition in contravention of Section 11(2) of the same Act as amended.

Nos. 2 and 3 Accused are self confessedly freedom fighters, members of the Pan African Congress (P. A. C), in transit through Swaziland to the Republic of South Africa intending there to take part in the so-called War of Liberation which is being waged by the Organisation of African Unity (O. A. U.) which has its headquarters in Dar-es-Salaam, Tanzania. They admit that they were in possession in Swaziland of the arms of war and ammunition in question which were destined to be introduced into the Republic of South Africa, and that they held no permit or licence to possess such arms of war and ammunition.

So far as No.1 Accused is concerned it was stated by the Crown witnesses Insp. Vilakati and Insp. Motsa that he admitted to having been in possession, with Nos. 2 and 3 Accused, of the arms of war and ammunition in question. He likewise had no permit or licence to possess them. The arms of war and ammunition were not found in the hut occupied by Nos. 2 and 3 Accused. On the police evidence

No.1 Accused pointed out the arms of war and ammunition during the absence of Nos. 2 and 3 Accused. I think there is no doubt on the evidence that No.l Accused well knew that Nos. 2 and 3 Accused were in possession of the Arms of War and Ammunition; but I have some doubt, which is increased by the evidence of the witness Martha Gulam, whether No.1 Accused can properly be said to have been in possession of it. No.1 Accused is not the owner of the homestead, which is owned by Gulam, and No.l Accused was living in one of the huts with his family. He has not been shown to have been a freedom fighter. In my view No.1 Accused is entitled to the benefit of the doubt and he is found Not Guilty and is discharged.

Mr. Shongwe submitted in regard to Accused Nos. 2 and 3 that there was no mens rea on their part. But neither in law nor in fact is there anything to justify this submission. The law is clear that the possession of arms of war and ammunition without a permit is an offence; and it is common cause that no such authority had been given to him by the Swaziland Government. The only authority which it is sought to invoke is the tenuous authority which No.3 says was given to him in Dar-es-Salaam by the O. A. U. of which Swaziland is a member. But this is clearly insufficient in the circumstances.

Nos. 2 and 3 Accused are found guilty on Counts 1 and 2 as charged.

JUDGMENT ON SENTENCE

Nos. 2 and 3 Accused have been found guilty on two counts of illegal possession of arms of war and ammunition in contravention of sections 11(1) and 11(2) or the Arms and Ammunition Act, No.24/1964 as amended by King's Order-In-Council No.26/1977.

The arms of war consisted of two assault rifles of USSR origin. The ammunitions consisted of four

magazines which would

have fitted these rifles, 1049 bullets fro them, 28 .38 special bullets and 3 .22 bullets.

No.2 Accused has no previous convictions. No.3 Accused was on 12th June 1976 declared a prohibited immigrant and was deported. He was on 24th March 1977 convicted of illegal re-entry into Swaziland and was sentenced to a fine of E50 or 50 days imprisonment which was suspended for three years on condition that he was not convicted of unlawful re-entry. It does not appear whether any steps were taken in regard to his re-deportation after that conviction; but I may say that it appears to be of very little value to convict a deported person of illegal entry and then to take no further action in regard to his deportation if indeed that was the case.

Mr. shongwe invited me to treat both No.2 and No.3 Accused on the same basis for the purposes of sentence. But it appears to me that No.3 Accused has shown himself to be a more undisciplined person, and more prone to defy the law, than No.2 Accused, and I propose to deal with him on this basis.

The possession of an arm of war was originally dealt with under Sections 11(3) and 14(1) of Act 24/1964. It should be noted that Section 11(3) referred to permission for the possession being given under the section; but in fact the section contained no provision for such permission.

The penalty, under section 11(8) for any contravention of the section, other than section 6(b), was a fine not exceeding R1000 or, in default of payment thereof, imprisonment not exceeding two years.

Section 14(l) rendered illegal the possession of an arm of war, and contravention of this provision was, by Section 14(2), visited with a penalty of imprisonment not exceeding

two years or a fine not exceeding R1000, or both.

Section 11 was amended by King's Order - in - Council No.26/1977. This introduced the possession of arms of war into Section 11(1) and Section 11(8) was amended to provide, in par.(b) thereof, that a person found in possession of an arm of war in contravention of subsection (1) or (3) should be liable on conviction to imprisonment for a period of 10 years or payment of a fine of E5000, or both. These penalties are, in terms of Section 31 of the Interpretation Act No. 21/1970 maximum penalties.

The legislature in enacting King's Order - in - Council No.26/1977 appears to have overlooked the provisions of Section 14, referred to above, which still remains on the Statute Book. But it seems clear that the earlier provision must give way to the later. Compare the maxim leges posteriores priores contrarias abrogant; 36 Halsbury's Laws of England, Vol.3, pars. 612, 709.

The patent conflict between the two provisions should, however, be remedied.

The penalty for illegal possession of ammunition -a fine not exceeding E1000, or in default of payment thereof, imprisonment not exceeding two years - has remained unaltered.

In the recent case of Z.W. Madela and Two Others vs. R., Cri.App.6/1978 heard on 26 May 1978, this Court declined to interfere with a sentence imposed by the Magistrate of

a) a fine of E400 or 400 days imprisonment for illegal possession of a firearm (pistol), 27 live rounds of ammunition, and two revolver magazines. These three counts were taken as one for purposes of sentence;

b) 12 months imprisonment for illegal possession of an arm of war (one hand grenade).

It was stressed in the present case that the Accused were freedom fighters who did not intend to use the arms of war and ammunition in Swaziland. This argument did not find favour with the Magistrate in Madela's case, supra; but I think it is, to some limited degree, a factor to be taken into account.

It was further urged that the Accused may have been misled in Tanzania into thinking that they could with impunity introduce arms of war and ammunition into Swaziland in transit to the Republic of south Africa.

As against this, however, I have to take into account that the amount of ammunition here introduced was vastly greater than that in Madela's case and was indeed a small arsenal in itself.

Mr. Shongwe further invited me to treat the two counts as one for purposes of sentence. I do not consider that I should do this, because of the difference in the penalties provided in the statute for the two offences. There is further the consideration that the legislature, by sharply increasing the penalty for illegal possession of arms of war, obviously takes a very serious view of this offence.
Mr. Shongwe finally asked me to consider the imposition of a fine only, without a prison sentence. Underlying this was the implicit suggestion that the fine might be paid by the O. A. U. I am not prepared to accede to this suggestion. Neither the Accused nor their advisers abroad are entitled to set themselves above the law and to flout the clear provisions of the law of Swaziland.

I have already mentioned that No.3 Accused must be given a somewhat heavier sentence than No.2 Accused.

No. 2 Accused will be sentenced to imprisonment for

18 months on Count 1 (arms of war) and No. 3 Accused will be sentenced to 21 months imprisonment on that count.

No.2 Accused will be sentenced to a fine of E750 or 18 months imprisonment on Count 2 (ammunition) and No.3 Accused will be sentenced to a fine of E900 or 21 months imprisonment on that count.

(C. J. M. NATHAN)

CHIEF JUSTICE

Mbabane,

14th June, 1978.