

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRI.T.S.34/1980

In the matter of:-

REX

vs.

WILTON MHLUNGO

CORAM:

C. J . M. NATHAN, C.J.

FOR CROWN:

A. F. M. THWALA

FOR DEFENCE:

IN PERSON

JUDGMENT AT CLOSE OF CROWN CASE

(Delivered on 17 April 1980)

Nathan, C.J. :

The Accused, Wilton Mhlungo, was originally charged on three counts of theft from Builders Place Co. Ltd. (referred to as Builders Place) with certain Petros Tsabedze, Dinqizwe Shabangu and Samuel Gama. Tsabedze and Shabangu pleaded guilty and were convicted and sentenced on April 14. The Crown withdrew the charges against Gama. The Crown then proceeded with the trial against the present Accused, who is undefended. The Crown has concluded its case against the Accused and it now becomes my duty in terms of Sec. 174(4) of the Criminal Procedure Act 67/1938 to consider whether a sufficient case has been made against the Accused to require him to make a defence.

I may say at once that there is no evidence implicating the Accused on Counts 1 & 3, and the Accused is entitled to his discharge on these counts. It remains to consider the position in regard to Count 2. This Count alleges the theft from Builders Place of building material to the value of E5001.96.

All of the original Accused were in the employment of Builders Place as drivers or conductors.

2

The general modus operandi. was that bogus orders for building materials would be placed in the name of Credit customers of Builders Place. The relevant consignments would be made up and handed to the drivers and conductors for delivery to the purported customers. These would then be taken to some other place and disposed of for the benefit of the drivers and conductors.

The evidence in regard to Count 2 establishes that an order for the materials in question was placed in the name of Entfonjeni School, Piggs Peak. The consignment was handed to Shabangu for delivery to the school but it found its way to the home of one Samuel Dlamini at Fonteyn where it was eventually recovered by the Police.

There are 2 main Crown witnesses against the Accused - Samuel Dlamini and Shabangu. Samuel Dlamini, who works at Swaziland Supply Centre, Mbabane, told the Court that he found the building material at his house at Fonteyn. As a result of a report which he had received he got in touch with the Accused. The Accused told him that Shabangu had told him (the Accused) that he had bought some iron sheets in the Republic of South. Africa and that because a motor vehicle had given trouble Shabangu had then asked the Accused if he knew of anybody at whose home he could leave the iron sheets which

would be taken to Pigg's Peak. Why the goods should have had to be taken to Fonteyn en route for Pigg's Peak does not emerge on Samuel Dlamini's evidence, Samuel Dlamini said he told the Accused to bring Shabangu, The Accused did so and Shabangu confirmed the story, but not in the presence of the Accused. There was no cross-examination of Samuel Dlamini in regard to this evidence.

Shabangu's evidence was to the effect that there was an order destined for Pigg's Peak and that

3

the consignment was handed to him and a conductor Z. Gama for delivery there. At the Komati river he had trouble with his vehicle and returned to Builders Place where a portion of the consignment was offloaded. He said that he was told by Petros Tsabedze (the original No.1 Accused) not to go to Entfonjeni but to go to Fonteyn instead because the people building at Entfonjeni would be coming to build at Fonteyn. He said he told the Accused what Petros was suggesting and consulted with the Accused as to where he should leave the consignment at Fonteyn and the Accused suggested Samuel Dlamini's home. He said he later told Samuel Dlamini that he had been sent by Petros to bring the iron sheets and because he did not know anybody there the Accused had suggested that he deliver them at Dlamini's place where the owner Tsabedze would find them.

Much of Shabangu's evidence may, in the light of his plea of guilty, be untrue. In particular it is by no means clearly established that Shabangu ever set out for Entfonjeni and had trouble with the vehicle at the Komati River. But this appears to be the story he put about. Nor was there ever a genuine order for Entfonjeni School. He would further appear to have been lying to Samuel Dlamini in telling him that Tsabedze was the owner of the goods.

But the difficulty facing the Accused is why he should have told Samuel Dlamini that Shabangu had told him (the Accused) that he had bought the iron sheets in the Republic, thereby suggesting that Shabangu was the owner of them and that to leave them at Fonteyn would be quite open and above board. The prima facie inference to be drawn from this is that the Accused, who knew that the goods emanated from Builders Place, was covering up for Shabangu as a socius criminis and facilitating the disposal of the goods at Fonteyn.

4

In my view there is a prima facie case for the Accused to answer on Count 2 and I am not prepared to grant his discharge on this Count at the present stage.

(C. J. M. NATHAN)

CHIEF JUSTICE

JUDGMENT

I have in my judgment at the close of the Crown Case set out the main facts in this matter, and I will not repeat these.

The Accused gave evidence in his defence. I found him to be an unsatisfactory witness. In his evidence in chief he gave a complicated and contradictory story which touched upon a number of aspects of the case but not upon those really in issue.

He started by saying that Shabangu asked him for a place where he could keep his iron sheets. He went on to say that he purchased some iron sheets from Builders Place on credit. He thought of taking these to Samuel Dlamini's place at Fonteyn but did not do so and Shabangu conveyed them to the Accused's home at Nhlanganc. He then said that one day Shabangu asked him where he could keep some iron sheets, his home being far away at Siteki. He told Shabangu he would ask Samuel Dlamini if they could be left at Fonteyn. Before he could ask Samuel Dlamini Shabangu took the iron sheets to Dlamini's place

himself. How he knew where to go does not emerge. He said he then went to Johannesburg and on his return found Shabangu's truck at Builders Place parked and loaded. Shabangu told him the truck was loaded with iron sheets and that the truck had failed to get to Ntonjeni. On another day thereafter he went to Samuel Dlamini to ask if he would keep Shabangu's iron sheets and Dlamini said that these were already at his place

5

There is, of course, an obvious contradiction in the sequence of these events. He then brought Shabangu to Dlamini.

Under cross examination he was asked why he needed to take his iron sheets to Fonteyn at all. He said that it was because Builders Place charged for transport. He did not say they charged for storage. This is extremely far-fetched.

When asked why he had told Samuel Dlamini about the goods having been bought in the Republic but destined for Piggs Peak he said he did not say that to Dlamini and did not hear him testify to this effect. Hence no cross examination of Samuel Dlamini on this vital point. Nor did he hear him say, so he said, anything about the lorry having failed. He said he did not remember clearly the mention of Piggs Peak.

He admitted he had been at Builders Place when Shabangu drove off with the consignment but when asked whether he had then directed Shabangu, where to go in Fonteyn he said that this was when he arranged with Shabangu to collect the Accused's own iron sheets. But it will be remembered that earlier in his evidence he said his iron sheets were not taken to Fonteyn.

I have no doubt that Samuel Dlamini, who was unshaken in his evidence was an infinitely superior witness to the Accused. To tell Samuel Dlamini that the goods belonged to Shabangu, and that the vehicle had broken down and that the goods would later be taken to Piggs Peak was in my view, beyond all reasonable doubt assisting in the disposal of property which the Accused knew to have been stolen from Builders Place.

In a case such as this the dividing line between actual theft and assisting in the disposal of stolen property is very fine. I think that the correct verdict to return is guilty as a socius criminis of assisting in the disposal of the property referred to in Count 2. As I said in my earlier judgment the Accused is found not guilty and is discharged on Counts 1 and 3 .

The accused is sentenced to 9 months imprisonment.

(C . J . M. NATHAN)

CHIEF JUSTICE