IN THE HIGH COURT OF SWAZILAND

In the matter of:

THE KING

vs

PHENEAS MAHLALELA

DISTRICT OF HHOHHO

REVIEW CASE NO. 100/87

JUDGMENT ON REVIEW

(03/07/87)

Hannah, C.J.

On 16th February, 1987 the accused was convicted of theft as a Government employee by the Mbabane Magistrate's Court. The principal evidence against him was that of an accomplice to the alleged crime. According to the accomplice the accused, who was employed as a security guard by the Central Transport Organisation, persuaded him one night to assist in the removal of a drum of oil from the Central Transport Organisation premises and deliver it to a certain person. This he did and he later handed the E80 he had received from that person to the accused and was given E40 for his services. Subsequently, the accomplice led the police to the place where the drum had been delivered and it was recovered. The only other evidence relied upon by the learned magistrate in convicting the accused was that

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when the accused was confronted by the police with the accomplice he did not dispute what the accomplice said. However, whether he was asked to say anything or warned that he need not say anything never emerged.

It seems reasonably clear that when the accused was confronted with the accomplice the police officer had already interviewed the accomplice and therefore was in possession of evidence which would probably have afforded reasonable grounds for suspecting that the accused had committed an offence. He should therefore have cautioned the accused that he was not obliged to say anything unless he wished to do so and in view of the fact that the police officer failed to inform the Court, one way or the other, whether he had taken this step it must be assumed in the accused's favour that he did so. On this assumption the failure of the accused to dispute the allegation made by the accomplice cannot possibly be treated as an admission by him. As is stated in Hoffman and Zeffert's South African Law of Evidence (3rd ed) at page 156:

"If an accused has been cautioned before being charged, his silence after the charge has been put to him cannot, obviously, amount to an admission - any other conclusion would make the warning a hazard and a trap." But is the position any different even assuming that the accused was not cautioned by the police officer?

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In Archbold, Criminal Pleading Evidence and Practice (42nd ed) at paragraph 15-67 the following passage appears:

"A statement made in the presence of a defendant, accusing him of a crime, upon an occasion which may

be expected to call for some explanation or denial from him, is not evidence against him of the facts stated, save in so far as he accepts the statement so as to make it in effect his own. If he accepts the statement in part only, then to that extent alone does it become his statement. He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, action, conduct or demeanour at the time when the statement was made amount to an acceptance of it in whole or in part."

In Hall v R 1971 1 A11 E. R. 322 Lord Diplock, having cited this passage with approval, went on to consider the situation in the case then before the Privy Council in which the Court a quo had held that the appellant's silence, when told by a police officer of the accusation made against him by a co-accused, amounted to an acknowledgment by him of the truth

of the statement made by the co-accused. Lord Diplock said:

"It is a clear and widely - known principle of the common law in ... England that a person is entitled to refrain from answering a question put to him for the purpose of discovering whether he has committed a criminal offence. A fortiori he is under no obligation to comment when he is informed that someone else has accused him of an offence. It may be that in very exceptional circumstances an inference may be drawn from a failure to give an explanation or a disclaimer, but in their Lordship's view silence alone on being informed by a police officer that someone else has made an accusation against him cannot give rise to an inference that the person to whom this information is communicated accepts the truth of the accusation."

It should be noted that Lord Diplock was speaking of a statement made by a third party and repeated to an accused by a police officer but, contrary to the opinion tentatively expressed in Hoffman and Zeffert (Supra) at page 157, I can see no real or worthwhile distinction to be drawn between this situation and a situation where the third party himself makes the

statement to the accused in the presence of a police officer. While there may be a difference when persons are speaking on even terms (see R v Mitchell 1892 17 Cox C.C. 503, 508) this cannot, in my view, be said to be the case where a police officer is present confronting the accused with his accuser. Accordingly, whether or not a caution was administered I am of the view that the learned magistrate was not entitled to rely on the accused's silence alone when confronted by the accomplice as an acknowledgment by him of the truth of what the accomplice alleged.

The only real evidence before the learned magistrate which implicated the accused was that of the accomplice. That evidence was not corroborated and the learned magistrate failed to warn himself of the danger inherent in accepting such evidence without corroboration or to give any indication whatever in his judgment that he was aware of such danger. In these circumstances Crown Counsel concedes in a written submission that the conviction cannot be allowed to stand and accordingly the conviction and sentence are set aside.

N. R. HANNAH

CHIEF JUSTICE