IN THE HIGH COURT OF SWAZILAND

APP. CASE NO. 36/88

In the matter b of:

PERCY STEWART

VS

REX

C O R A M	F. X. ROONEY
FOR APPELLANT	DUNSEITH
FOR RESPONDENT	M. SIBANDZE

J U D G M E N T

(Delivered on 8/9/88)

Rooney, J.

On the 28th April, 1988 the appellant was convicted in the Magistrate's court for the District of Lubombo of the offence of pointing a firearm at a person without lawful excuse contrary to section 23(2) of the Arms and Ammunition Act 1964. The magistrate (S. Jute) sentenced the appellant to a fine of E250 or 6 months imprisonment in default of payment, plus a further six months imprisonment suspended for three years on condition that he is not convicted of a contravention of section 23 of the Act committed during the period of the suspension.

At the hearing of the appeal Mr Dunseith for the appellant indicated that he would rely on one ground of appeal against conviction namely -

3. The magistrate erred in finding that the offence had been proved in the absence of evidence from an expert in firearms or ballistics to establish the requirements

of the definition of "firearms" in section 2 of Act 24/1964.

The appellant also appeals against the severity of the sentence.

There was evidence before the court below that the appellant, who is a Sub-Inspector in the Royal Swaziland Police was on the 3rd October 1987 ejected from a discotheque at the Siteki Hotel as he was drunk. He returned 30 minutes later carrying o rifle. He appeared to load it and advanced on the complainant, who is the door keeper, in a threatening manner pointing the firearm at him.

The police arrived shortly afterwards. They did not effect an arrest as the officers concerned were junior in rank to the appellant. It was not until the 14th January, 1988 that the police took possession of the rifle allegedly used by the appellant during the incident. It was produced in court as exhibit 1.

Mr Dunseith submitted that no evidence was placed before the court that the rifle in the possession of the appellant was a firearm within the definition set out in section 2 of the Act, He relied upon a judgment of Hannah C.J. dated the 20th April this year in Appeal No.16/88, Dumisa Mahlalela vs. The King (unreported). The learned Chief Justice said -

"One matter which troubles roe, however, is whether it can be said that Crown sufficiently proved that the pistol found in the appellant's possession was a firearm within the definition of that term as set out in the Act. Section 2 of the Act provides: "firearm" means -

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(a) a pistol, revolver, rifle, shotgun or other lethal barelled wapon of any description -

i) from which a shot, bullet or other missilecon be discharged; or

ii) which can be adapted for the discharge of a shot, bullet or other missile or;

b) ....."

There was no evidence that the pistol in question was fired during the robbery nor was there any evidence, as is usually the case, that the pistol was capable of being fired. This was a matter which the learned principal magistrate does not appear to have considered. He was apparently content to assume that the pistol was capable of firing a bulet.

In every Criminal case the Crown must prove all the essential elements of the offence charged and when the charge is one of unlawful possession of a firearm it must prove that the article possessed was indeed a firearm as defined in the Act. Not all pistols are capable of firing bullets and many replicas of pistols are to be found on the market. In my judgment the failure by the Crown to prove that the pistol found in the possession of the appellant was capable of firing a bullet was a fatal flaw in the Crown's case which could not be cured by making resumptions".

The following evidence material to that issue was recorded. The complainant said that the weapon held by the appellant was "a rifle like the one before the court". He said that the appellant was loading the gun.

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Detective Constable Shongwe (PW2) saw the appellant with a gun near the Siteki Hotel on the same evening. He said it was "a rifle like exhibit 1". This exhibit had already been received in evidence although it was not in the possession of the complainant who "produced" it. In answer to questions put by the trial magistrate, this witness said that the exhibit was not a type used in the police force.

Inspector Johnson Groening (PW3) went to the house of the appellant in January. The appellant was reluctant to produce 10 the rifle. Later he handed over a sports rifle which the wit- ness identified as exhibit 1. The witness said that exhibit 1 is in good condition and well looked after.

The Inspector was cross examined about the seizure of the exhibit. He explained that as the appellant had refused to hand over his gun, a search warrant was obtained.

The witness told the court that exhibit 1 was serviceable and the property of the appellant. However, no nexus was established between the rifle seized by this witness and that used by the appellant at the material time.

At the end of the prosecution case the magistrate was supposed to apply section 174 (4) of the Criminal Procedure and Evidence Act. If the court considered at that stage that a case was not mode out against the appellant sufficiently to require him to make a defence it was obliged to dismiss the case and forthwith acquit the appellant (R. v. Mtetwo and others 1970-76 SLR 364). There is no indication on the record that the magistrate applied his mind to the section. If he had done so, it is passible that he might have concluded that there was

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no evidence at all that the gun produced by the appellant at the Slteki Hotel was a firearm within the definition of the Act, there being no evidence that it was the same weapon as that produced in court.

Mr Dunseith submitted that the state of the evidence at the close of the prosecution case was such that the appellant ought to have been acquitted and not required to enter upon his defence and on that basis this court should allow the appeal. Mr Sibandze argued that on appeal the Court must look at the totality of the evidence, including that adduced by the appellant at the trial.

The point is one of considerable difficulty. In the case of Rex vs. Kritzinger and others (1952) S.A. 401 Roper J considered the position under section 221(3) of the Criminal Procedure and Evidence Act of South Africa. That section was designed for jury trials, and it used the word "may" rather than "shall" which appears in the Swaziland section. Roper J considered that the judge had a discretion in the matter whether or not to discharge an accused. He said at p. 406 -

"It seems to me that the rule is clear, namely that if at the close of the case for the Crown the evidence against the accused, is not such that a reasonable man might convict upon it, the judge has a discretion whether or not to discharge. He is quite entitled to refuse to discharge if he consideres that there is a possibility that the case for the Crown may be strengthened by evidence emerging during the course of the defence".

The latter sentence gave Bekker J. considerable difficulty in R. vs. Herholdt and others (3) 1956 (2) S.A. 722 at 723. The Swaziland section reads :

"174 (4) If at the close of the case for the prosecution the court considers that a case is not made out against the accused person sufficiently to require him to make defence it shall dismiss the case and forthwith acquit him"

This puts a duty on the trial court to consider the evidence. Difficult questions might arise if it appeared that a magistrate had considered the evidence and misdirected himself as to its quality or impart and either dismissed thy charge or allowed the case to proceed. In his evidence the appellant admitted that he was in possession of exhibit 1 on the night in question, but, denied that 15 he had pointed it at anyone. The magistrate disbelieved the appellant as to his use of the rifle. On the evidence he was entitled to so find.

Inspector Groening's evidence that the rifle was serviceoble was sufficient, in my view, to establish that it was one from which a bullet can be discharged, and it thus fell within the definition of a firearm under the Arms and Ammunition Act.

In Rex v. Eiman (1947) 2 S.A. 1D31 Newton Thompton J. at 1033 found that the magistrate should have acquited the accused at the end of the Crown case but he went on -

"It seems to me however that I en not justified in allowing the appeal on this ground, merely because I think the magistrate was wrong at that stage if the subsequent evidence led does establish a crime for which the accused con rightly

be convicted on the charge". The learned judge referred to Rex vs. Lakatula and others (1919) A.D. 362. The decision in Lakatula turned on a provision in Act 31 of 1917 (section 372) which allowed for the reservation of questions of law for the consideration of the Court of Appeal. The Appellate Division held that the question as to whether the trial judge should not have withdrawn a case from the jury at the close of the Crown case was not a question of law which could be so reserved as the judge had a discretion in the matter which could not be called in question under section 372. I am of the view that R. vs. Lakatula

and others is not on authority which bears on the issue before me. Nor is Rex vs. Eiman (Supra) a reliable authority in so far as Swaziland procedure is concerned.

In the English case of R. v. Abbot (1955) 2 all E.R. 899 there were two accused. At the close of the case for the prosecution there was no case for the appellant to answer. The trial judge refused a submission by counsel for the appellant that he should be discharged. The trial proceeded and the other accused gave evidence implicating the appellant and he was convicted.

On appeal, the Court of Criminal Appeal held that where there was no evidence against one of two persons that he committed the offence, then on that accused submitting that there is no case against him to go to the jury, it is his right that the case should not be left to the jury. Lord Goddord said at 902 -

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"Here we have a question whether or not there was a right decision in point of law by the Judge. In our opinion, the learned Judge ought to have said at the end of the case for the prosecution that there was no evidence against the appellant, and therefore he was wrong in law in giving the decision which he did give". Both Finnemore and Devlin 3.3. concurred in this decision and the conviction was quashed.

In Botswana the corresponding section 179 (3) (formally section 172 (3) of the Criminal Procedure and Evidence Act roade;

"If, at the close of the case for the prosecution, the court considers that there is no evidence that the accused committed the offence charged in the indictment or summons, or any other offence of which he might be con - victed thereon, it may then return a verdict of not guilty".

Over fifteen years ago I had occasion to consider that section in The State vs. Nyambe and others (1973) (1) Botswana Law Reports 58. I made the following observations; "As accused No.1 was not represented, no application was made to the court for his discharge under section 172 (3) of Cap. 18. It is not possible to say whether or not, if such an application had been made, it would have succeeded. The learned Magistrate had a discretion in the matter, wh which discretion had to be exercised Judicially. The record does not indicate that the learned magistrate considered the operation of Section 172 (3) at all at the close of the State case and I must assume therefore, in the absence of any notation on the record that she did not do so. Therefore there was no determination by her as to

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whether there was, or was not, evidence against accused No.1 that he had committed the offence with which he was charged. Nor was there any exercise by her of a judicial discretion either to discharge the accused or proceed with the trial against him at that stage.

I take the view that in every case where an accused person is unrepresented, a trial court has a duty to consider at the end of the State case the evidence against an accused, as if an application for a discharge had been made by the accused under section 172 (3). Thereafter, the presiding officer should note on the record of proceedings that the section has been so considered. Had the learned magistrate on this occasion taken that course, there is every possibility that she would have concluded that there was no evidence against accused No.1 and she might thereupon have returned a verdict of not guilty against him.

A provision very similar to section 172 (3) exists under section 157 of the Criminal Procedure Act, 1955 of South Africa and there is an abundance of authority derived from decisions of the South African courts to support the proposition that the exercise by a magistrate of o discretion not to return a verdict of "not guilty" at the close of a case for the prosecution cannot be taken on appeal. (R. v. Lakatula & Others 1919, A.D. 362; R. v. Eimal, 1947 S.A. 103). I consider that these authorities are sound and should be followed by this Court, but the discretion conferred by the section must, as I have said, be exercised judicially and if it is not exercised at all,

as appears to have been the case here, then it cannot be said to have been exercised judicially". I have no reason to depart from that view. However, in Swaziland the section contains the words "it shall dismiss the case and forthwith acquit him". That is a mandatory requirement and leaves no room for the exercise of any discretion on the part of the judicial officer.

In the present instance the magistrate did not consider the state of evidence at the close of the presecution case, or so it appears. Had he done so, the appellant ought to hove been acquitted. The trial proceeded and the appellant in his own evidence filled the lacuna in the presecution case.

It is not the intention of our criminal procedure that an accused person, whether represented or not, should be placed in jeopardy when the trial court is wrong in law in allowing a case to proceed when it ought not to have done so.

The appellant was entitled to be acquitted at the close of the prosecution case. He Cannot forfeit that right by his election to give evidence. This court sitting an appeal cannot condone what amounts to a miscarriage of justice.

This appeal is allowed. The conviction and sentence are set aside. The fine, if paid, must be returned to the appellant together with the fee paid on filing this appeal.

F. X. ROONEY

JUDGE