



IN THE HIGH COURT OF SWAZILAND

CRIM. CASE NO. 1/1993

In the matter between

THE KING
VERSUS

CARLOS MASHABA
ERIC TIMELE
TOMAS MTHEMBU

CORAM : DUNN J.

FOR THE CROWN : Mr. KILIKUMI

FOR THE ACCUSED : Mr B.: SIMELANE

JUDGEMENT

2ND DECEMBER 1993

The three accused are jointly charged with the crime of attempted murder on counts 1 and 2 and with the crime of robbery on count 3. Accused no. 1 is charged with the possession of a firearm and ammunition in contravention of the Arms and Ammunition Act no. 24/1964 on counts 4 and 5 respectively. He is further charged with entering Swaziland in count 6 contravention of section 14(2)(c) of the Immigration Act 1964. Accused no. 3 is also charged with entering Swaziland in contravention of section 14(2)(c) of the Immigration Act on count 7.

I should point out that the sections of the Arms and Ammunition Act, which accused no.1 is alleged to have contravened have not been correctly cited. The amending Act no.6/1988 did not change the original numbering of the sections of the arms and Ammunition Act 1964. The possession of arms and ammunition is dealt with under Sections 11 and 14 of the Act and the reference should not be to a contravention of sections 2 and 3 of the amending Act no. 6 of 1988. Accused no. 1 was legally represented at the trial and the body of the charges clearly particularised the offences, as the possession of a pistol and the possession of (5) five rounds of ammunition. Accused no. 1 was, in the circumstances, not in anyway prejudiced by the citation of the incorrect sections.

The accused pleaded not guilty to all the counts.

Counts 1, 2 and 3 in which the complainants are Justice Nxumalo; Wesley Carmichael and Rose Mlungu respectively, may conveniently be dealt with together. The evidence led by the crown on these counts fully established the commission of the offences. Three men entered the Fairways Supermaket in Nhlanguano before 4.30 p.m., Monday 22nd of June 1992. Two of the men approached the office of the Manager, Justice Nxumalo and one of them fired a shot through a glass partition in the direction of the Manager. According to Nxumalo the shot whizzed past his forehead and the bullet was found embedded in the wall on his left hand side. One of the men entered the office of the cashier, Rose Mlungu. The man was armed. He demanded the "hot stuff"

Rose concluded that the man wanted money. The man took the green leather bag into which Rose had placed the money after cashing up for the day. The bag was locked with a padlock. The two men left and when they got to the main door the third man took the green bag and placed it in a plastic bag. The three men disappeared. At about that time, Wesley Carmichael, the deputy sheriff for the Shiselweni District, was driving a light delivery vehicle towards his mother's house along 4th avenue. He saw a man trotting into the middle of the road ahead of him. The man suddenly drew a gun and fired at Carmichael. The bullet struck and shattered the windscreen. The bullet struck the windscreen more on the driver's side of the cab and exited below the rear window. Carmichael continued driving and the man jumped to the right handside of the road from where he fired a second shot which struck Carmichael on the right upper arm. Carmichael continued driving. He looked through the rear view mirror and saw the man running in the street in the opposite direction to which he (Carmichael) was driving. Carmichael managed to get to his mother's house from where he was taken to the Nhlangano Clinic. He was transferred to a clinic in South Africa and had to receive specialist treatment. A bullet remains lodged above his diaphragm. As set out earlier I am satisfied that the crown's evidence proved the Commission of the two attempted murder and robbery charges.

The Nhlangano police were telephoned as soon as the robbers left the supermarket. The police were given a

clear description of the clothes worn by the robbers. The description was given by Rose Mlungu and Bhekie Zwane, a shop assistant. Zwane had first seen one of the robbers when he entered the shop and enquired as to the price of vegetable seeds from Zwane. The man later left and returned with two other men and the robbery took place. The description given by these two witnesses was that the man with a gun was wearing a white pullover with a hood. The pullover appeared to be a track suit top. He had a balaclava over his head. The balaclava was brown with cream stripes. He was wearing sunglasses and dark grey trousers. The second man, who removed the money bag from Roses office, was wearing a light coloured shirt and trousers. The third man was wearing a distinctive multi-coloured "tie and dye" V neck shirt which the witnesses described as a Zambian shirt. The man had the shirt over a brown long sleeved jersey.

Carmichael was able to give the police a description of the clothes worn by his assailant before being transferred to South Africa. He told the police that the gunman was wearing a "white tracksuit like top" and dark coloured trousers. The man had on a dark balaclava and sunglasses.

Working on the description of the clothes given by Rose and Zwane and the directions given by members of the public the police drove towards Ngwane Training College. It

was not long before three men, wearing clothes that matched the description given by the two witnesses, were spotted running across a clearing in a nearby forest. Shots were fired by the police and accused nos. 1 and 2 were arrested. Zwane was present when the arrests were made. He was able to immediately confirm that the two persons were wearing the clothes he had earlier described. The two accused were questioned and accused no. 2 produced a green money bag from beneath a fallen tree. It started getting dark and the police returned to the police station with the two accused.

The police had taken the precaution of warning the taxi-drivers in Nhlngano to be on the look out for persons who might request to be driven out of Nhlngano that evening. One of the taxi-drivers Bhekie Hlophe told the court that he was approached by a man at about 8.00 p.m. The man requested that he be driven to Manzini. Hlophe informed him that the fare to Manzini was E150.00. The man replied that he only had E100.00 which he would pay on arrival at his house at Fairview Manzini. Hlophe insisted on the full fare being paid in advance. The man explained to Hlophe that he had come to Nhlngano to collect E30.00 which was owed to him and thereafter requested Hlophe to assist him in securing accomodation for the night. Hlophe suggested that the man should approach the police. He gave the man directions to the police station. The man walked away and Hlophe followed him in his motor vehicle. Hlophe ensured that the man entered the police station. The man was wearing the "Zambian " shirt described by Rose and Zwane and was pointed out by Hlophe as accused no. 3. The three accused thus ended up at the Nhlngano police station on the night of 22nd June.

According to the investigating officer the following took place on the next day-:

1. The green leather bag and its contents (2, 178.48 in cash and a cheque in the sum of E10.00) were identified by Rose and the shop manager Mr. Nxumalo as having been taken in the robbery.
2. The three accused were taken to the forest where accused no. 1 and 2 had been arrested. Accused no. 1 pointed to a spot in the forest where a Makarov pistol with 5 rounds of ammunition was recovered. Accused no. 1 also pointed out a brown balaclava which had sunglasses in it.
3. the 3 accused were taken to the place of the robbery where they were photographed.
4. All the items of clothing which had been described by Rose , Zwane and Justice Nxumalo were identified by the three witnesses at the police station. The items had all been recovered from the three accused persons.

The police took possession of the spent bullet which was embedded in the wall of Justice Nxumalo's office. Carmichael's vehicle was taken to the police station by his sister. The path of the bullet that shattered the

windscreen was traced and a spent bullet was found on the tailgate of the vehicle. The two spent bullets and the Makarov pistol were sent to the forensic Science Laboratories in South Africa for ballistics analysis. Warrant officer Van Der Merwe who carried out the analysis, told the court that the spent bullets had been fired from the Makarov pistol. He exhibited photographs showing the spent bullets alongside test bullets which had been fired from the pistol and explained how he had reached his conclusions. His evidence was not challenged.

Carmichael was able to point out the white track suit top he had described, in court.

The evidence of the arrest of the accused, based on the very clear evidence of what the robbers were wearing is overwhelming. The recovery of the money bag, and the result of the ballistics tests on the firearm pointed out by accused no 1 and the 2 spent bullets placed the identity of the 3 robbers beyond any doubt.

I ruled at the conclusion of the crown's case that accused nos. 2 and 3 had no case to answer on count 2 (attempted murder of Carmichael). The two accused were found not guilty at that stage.

The accused each gave evidence on oath denying all knowledge of the robbery and attempted murders. Accused no. 1 told the court that he was arrested by the police whilst waiting for a friend who had gone to relieve himself in the

forest. He told the court that the police gave him the white pullover to wear after his arrest. He explained that a police sniffer dog had found the Makarov pistol in the forest. I have no hesitation whatsoever in rejecting as totally false the evidence given by accused no. 1. The white track suit top was worn by him and was identified by the crown witnesses. The spent bullets recovered from Nxumalo's office and Carmichels's vehicle were fired from the pistol which he pointed out to the police.

Accused no. 2 denied having been arrested in the forest. He told the court that he was arrested in town, near Metro Cash and Carry Wholesalers. Accused no. 2 was clearly identified by his clothing and was arrested in the forest. He pointed out the green money bag.

Accused no. 3 gave a long story of how and why he came to Nhlngano. It would have been very simple for him to take the police to the place where the car he claimed he had come to collect was parked. He could easily have told the police the name of the person who brought him to Nhlngano. The reason he gave in court for his presence in Nhlngano differed from that given to the taxi driver. His evidence stands to be rejected as false.

It is quite clear that the 3 accused were acting in furtherance of a common purpose when they entered the supermarket. They were all near the manager's office when the shot was fired. Rose was immediately thereafter, robbed of the E2,188.48. I find accused 1,2, and 3 guilty as charged of attempted murder on count 1 and of robbery on count 3.

In so far as count 2 is concerned there can be no doubt as to accused no. 1's intentions. The first shot was fired at Carmichael who was fortunate not to have been struck. The accused then jumped to the side and fired the second shot. The reason for all this is not at all clear. The deputy sheriffs do not wear a uniform. Carmichael was not aware of the robbery at the Supermarket and did not do anything which could have been interpreted as an attempt to apprehend or interfere with any of the robbers. I find accused no. 1. guilty as charged on count 2.

Accused no.1 had no permit to possess the pistol and 5 rounds of ammunition. Subject to the comments I made earlier regarding the sections under which accused no. 1 was charged on counts 4 and 5, I find him guilty of possession of a firearm and 5 rounds of ammunition in contravention of sections 11(1) and 11(2) respectively of Act No. 24/1964 as amended.

Section 14(2)(c) of the Immigration Act no. 17/1982 under which accused nos. 1 and 3 were charged on counts 6 and 7 provides that any person who unlawfully enters or is unlawfully present in Swaziland in contravention of the Act shall be guilty of an offence. The charge against the accused was particularised as unlawfully entering Swaziland. According to the investigating officer accused no. 1 was asked what his nationality was. He replied that he was Angolan. He was asked if he had a residence permit to remain in Swaziland. Accused no. 1 did

not produce one, but explained that he had entered Swaziland in 1988 on a valid passport which had since gone missing. The accused explained that he had a certified copy of his passport which he used for travel between Swaziland and Maputo after the loss of his passport. The police did not seek any further details regarding the accused's last date and place of entry into Swaziland. In any event the enquiry by the police was as to whether the accused had a permit to be in Swaziland and not as to whether he had entered Swaziland lawfully. I find accused no. 1 not guilty he is acquitted and discharged on count 6.

The position of accused no. 3 is that he told the police that he had entered Swaziland in about 1978. Accused no. 3 was not questioned as to the legality or otherwise of his entry into Swaziland. He handed to the police his graded tax Certificate which reflected that he was a subject of the chief of eLwandle, outside Manzini. It is not, quite clear to me how an alleged illegal immigrant can become the subject of a chief in Swaziland. The accused has been in Swaziland for about 15 years. I do not see what interest is sought to be served by prosecuting him for an alleged illegal entry in 1978.

I find accused no.3 not guilty, he is acquitted and discharged on count 7.

Before summing up, I should again refer to the need for the police to pay proper attention to their investigations. Their movements, in and out of the police stations with suspects should be recorded in the official

occurrence books that are kept at each police station. Further it is no business of the police to direct suspects to apologise to complainants. There is acceptable evidence that that was done in this case. The function of the police was to gather the evidence and present it to the Director of Public prosecutions. Requests if any, by the accused to see the complainants should have been handled by officers other than the investigating team.

To sum up accused nos. 1, 2 and 3 are found guilty of attempted murder on count 1.

Accused no.1 is found guilty of attempted murder on count 2.

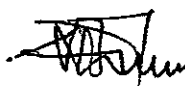
Accused nos.1, 2 and 3 are found guilty of robbery on count 3.

Accused no. 1 is found guilty of possession of a Makarov pistol in contravention of section 11(1) of Act no. 24/1964, as amended, on count 4.

Accused no.1 is found guilty of possession of 5 live rounds of ammunition in contravention of Section 11(2) of Act no. 24/1964, as amended, on count 5.

Accused no. 1 is found not guilty, he is acquitted and discharged on count 6.

Accused no.3 is found not guilty, he is acquitted and discharged on count 7.


B. DUNN
JUDGE