IN THE HIGH COURT OF SWAZILAND

Rev. Case No. 33/95

In the matter between:

THE KING

vs

PATRICK PANSULA DLAMINI
and

ISAAC FANA NKAMBULE

CORAM: Hull, C.J.

Review Order
(29/3/95)

The accused was charged with one Nkambule with armed robbery and a second count of unlawful possession of a firearm.

Both denied the charges. At the conclusion of the case, the learned Senior Magistrate convicted the accused on the count of armed robbery, and acquitted him on the other charge. He acquitted Nkambule on both counts.

The Senior Magistrate imposed a sentence of three years imprisonment on the accused, backdated to 3rd August 1994 to take into account the time that he had already spent in custody on the charges.

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At the time of sentencing, the accused was 20 years old. The charge related to an incident that had occurred some seven months earlier. He had one previous conviction for house breaking and theft, for which he had been sentenced on 5the December 1990 to a fine of E60 or, in default, six months imprisonment.

He was unrepresented at his trial on the charges to which the present review applies.

The Crown's case was that in the late afternoon of 30th April 1994, Mrs. Sibangakonke Mamba had just finished counting the day's takings in her husband's shop at Dlangeni, in which she worked as the manageress. She was with two of her brothers, a woman and a girl.

The accused had come into the shop with two other males. The accused and one of them bought some bread. It appears from the evidence that they left. A young man called Patrick Mkabela then came in to buy bread. After he entered, the door was closed. Then someone knocked at the door. Mr. Mamba opened it.

Two men came in. They were, allegedly, the accused and Nkambule.

According to Mrs. Mamba, Nkambule did not have his face covered. He had a gun which he pointed at the people in the shop. He did not say anything. It was the first time she had seen Nkambule.

She said that the accused at first had a scarf covering his mouth and neck. He shouted "nyuku make" repeatedly. As he did so his scarf fell down, showing his face. She said that she recognised him as the accused, whom she knew to be a bus conductor. She said that she knew him by the name "Pansula". Mrs. Mamba's daughter threw E680 - the takings - on the floor. The accused told Mrs. Mamba to pick it up and hand it to him. She obeyed. Then the two robbers locked everyone in the shop and made away.

Mrs. Mamba said that during the robbery, the shop had been lit by a candle on the counter. The counter was as high as her chest. The two men had been about two metres in front of her (a distance which she demonstrated to the satisfaction of the presiding Senior Magistrate.)

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Subsequently, in August, she was called to a police station where she identified the accused and Nkambule as the robbers. From the record of evidence, it appears that this was done by way of confrontation rather than at an identity parade.

Patrick Mkhabela said that he also knew the accused as "Pansula" and he had been in the habit of using his bus. He had first seen him at the beginning of 1992 and the accused had been a conductor on the bus for a whole year until some time in 1993. He had next seen the accused on 30th April.

Mr. Mkhabela said that 30th April was on the other hand the first occasion on which he had seen Nkambule.

He corroborated Mrs. Mamba's account as to the way in which the two robbers had gained access to the shop, and - except in two details - as to what then transpired. Mr. Mkhabela said that he had had a suspicion that the person with the scarf around his face was the accused, because he knew his voice, and that the suspicion had been confirmed when the scarf fell down. He indicated that he himself had been two or three metres from the robbers.

The points on which his account differed from that of Mrs. Mamba were that his evidence was that it was Nkambule who had told her to pick the money up from the floor and had taken it from her. Thus, he also was saying that Nkambule did speak. He said that he used the word "Yibutse", meaning "you, pick it up"- and he also said that when Nkambule came in, he had told them that they must not move even an inch - "singanyakati".

There was other Crown evidence that the accused had worked for Thula bus service from 1992 until the middle of 1993, and thereafter for the Hollywood bus service. There was also evidence from two taxi drivers to the effect that late in the afternoon on 30th April the accused, Nkambule and another person had hired one of those taxi drivers to take them from Mbabane to Dlangeni and back again.

The defence of the accused, which he put to the relevant prosecution witnesses, was that he had been identified wrongly as one of the

robbers. He said that on the day of the robbery, he had been in Nhlangano working for Stocks and Stocks Construction Company, by whom he was employed. He maintained that certain Crown witnesses, notably the taxi drivers, had been put up to their accounts by the police. He denied ever hiring a taxi to go from Mbabane to Dlangeni as alleged.

Although the Crown prosecutor cross-examined him in such a way as to make it clear to the accused that the Crown was contending that he was indeed one of the robbers, the prosecutor himself did not question him specifically at all about his alibi or, in particular, about his claim that he was on 30th April employed by the Nhlangano company.

When the prosecutor completed his cross-examination, however, the Senior Magistrate of his own initiative proceeded to question the accused at length about this aspect of the case. These questions and the answers by the accused begin at page 28 of the record and end at page 30. As far as it can be demonstrated from a written record, the presiding Senior Magistrate's questions were put carefully and dispassionately and I do not doubt at all that that was so.

The extent of the examination by the court, however, is demonstrated by the fact that the record of these questions and the answers runs to two fullscap pages of fairly small type. Thirty one questions in all were put to the accused, by the Senior Magistrate, on this particular aspect of the case. It can be seen that the court explored in considerable detail the basis for the claim by the accused that he had been working for the Nhlangano company on 30th April.

The Senior Magistrate elicited in particular from the accused in particular an assertion that his foreman or supervisor on 30th April had been a man named Brown, but that on that day he had not been there and an indvuna had instead been present.

Then, after both the accused and Nkambule closed their defences, the Senior Magistrate, of his own motion directed under section 199(2) of the Criminal Procedure and Evidence Act 1938 (No. 67 of 1938) that the wages clerk for the Nhlangano company be summoned to court as a witness, with the records of employment of the company for 30th April 1994.

This was done. In fact Mr. Reuben Msibi, the company's accountant, attended with the wage records for that day. One of the answers of the accused, in his own response to the Senior Magistrate's questions, had been that he had been paid on that day in cash.

On being sworn, and questioned by the court, Mr. Msibi said that he did not recognise either the accused or Nkambule, and that he could not find any records of the employment of any person called Patrick Pansula Viki Dlamini by the company, even though he had searched the records from the middle of April 1994 until the present time. (There was evidence that "Viki" was one of the names of the accused). He also contradicted other answers that the accused had given to questions put to him by the court, namely that he had been paid in cash on 30th April, which had been a Saturday. Mr. Msibi explained that the company's practice was to pay its employees, including temporary staff, by cheque before midday on Fridays and that it never paid out wages on Saturdays.

The accused cross-examined Mr. Msibi, putting it to him that he was mistaken but the accountant's response indicates that he was not shaken in his evidence.

The Senior Magistrate then suggested to the accused that he reminded Mr. Msibi of the name of his foreman. The accused responded that he had forgotten his name. The Magistrate himself then informed Mr. Msibi that the name that the accused had given earlier was "Brown", and that he had worked or the company from 10th March 1994 to 30th April 1994. It does not appear to me, from the record, that the accused had ever said that Mr. Brown worked for the company from 10th March to 30th April. I think that the Senior Magistrate may have been telling Mr. Msibi that the effect of the evidence of the accused was that he himself - the accused - had been with the company throughout that period. But, be that as it may, Mr. Msibi replied that the accused must have been mistaken "because Mr. Brown was at Piggs Peak during that period", and he went on to add "in fact Mr. Brown was transferred to Nhlangano on 30th June 1994."

After that, the Senior Magistrate gave the accused an opportunity to ask Mr. Msibi further questions if he wished, and to reopen his case

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to present further evidence if he so wished. The accused declined each of these opportunities.

The records that Mr. Msibi had brought with him were handed over to the court for its consideration.

In giving judgment, the Senior Magistrate said that he accepted the evidence of Mrs. Mamba and Mr. Mkhabela, and that Mrs. Mamba was robbed as alleged in the first count, and also that the faces of the robbers were illuminated by a candle that was burning on the counter about 1.5 meters above the ground. He reminded himself of the cautionary rule in respect of evidence of identification, and concluded that no sufficient safeguard existed against the possibility of mistaken identity in Nkambule's case.

In relation to the accused, the Senior Magistrate found two things to be, in his own words "wholly adequate safeguards", namely:

(a) his scarf had slipped, allowing the people in the shop to see the features of his full face; and

(b) the candle light was obviously bright enough to allow for the day's takings to be counted, and high enough to illuminate the features of the accused who was within two metres of Mrs. Mamba and three metres of Mr. Mkhabela.

He convicted the accused of robbery, as charged.

Leaving aside for the moment the aspect of the case that relates to the court's questioning of the accused about his alleged employment by the Nhlangano company, and Mr. Msibi's testimony, I do not consider that there are grounds for interfering on review with the Senior Magistrate's judgment, either on conviction or on sentence.

Although his reasons for judgment are short, the record clearly discloses the fact that he addressed his mind to the dangers of mistaken identity and a sufficient basis for his findings against the accused. He said that he accepted the evidence of Mrs. Mamba and Mr.

Mkhabela. Both said that that the accused was a person who was known to them. Both also said that they saw Nkambule for the first time on 30th April. In saying that he accepted their evidence, the Senior Magistrate was not disregarding the cautionary rule. Notwithstanding his findings that there was adequate lighting, he applied the cautionary rule in favour of Nkambule. He did so, obviously, because the two Crown eye witnesses were saying that Nkambule was not a person known previously to them. Although he did not say so expressly, he might also have taken into account the fact that they next saw Nkambule some time later, in police custody.

The position of the accused was different. They already knew him. On that basis, having cautioned himself, it was open to the Senior Magistrate to accept their identification.

Subsequently, he nevertheless did initiate and conduct what amounted to his own independent investigation into the alibi advanced by the accused. It was perhaps an unsual course. A court has a very wide discretion to recall witnesses. Such a course is permissible even to supply an essential ingredient of the offence. In exercising that discretion, however, the court must be careful not to take over the prosecution or the defence of the case, or to appear to do so. Where an accused person is unrepresented that is, I think, especially important. Questioning at length by the bench may also indicate or give the impression of indicating undue participation in the arena itself. Circumspection is therefore necessary in exercising the discretion.

In the present instance, however, the course taken by the learned Senior Magistrate was not only unobjectionable but also a sound one. He prefaced his intention to do so by stating that he considered it necessary for a just decision. The record does not indicate at all that he couched his questions unfairly. I do not consider that the extent of the questioning, in this case, was unfair either.

The crucial issue in the case was whether, applying caution, he was able to satisfy himself beyond reasonable doubt that Mrs. Mamba and Mr. Mkhabela had identified the accused correctly as one of the

robbers. They had known him. On the evidence, there was enough light to give them the opportunity to have recognised him.

But then, in response to their testimony, the accused came up with an alibi. What the Senior Magistrate did, of his own accord, was to check that alibi. I think that he was right to do so, in order to enable himself to reach a just verdict. He found Mrs. Mamba and Mr. Mkhabela to be credible witnesses. Nevertheless, if the accused had been in Nhlangano on the day in question, that would have put a very different light on the matter. In taking the course that he adopted, he was taking a further precaution before concluding that he was satisfied that the two key prosecution witnesses were indeed telling the truth. In the result, there were very strong reasons for concluding that the alibi was false, but on a proper view he was not thereby prosecuting the Crown's case. What he was doing was simply to investigate a possibility that the Crown witnesses were mistaken. He was in my view entitled to do that and, having done so, to decide that they were not.

Notwithstanding his age, the sentence was correct, given the nature of the crime and his previous conviction.

The conviction and sentence are therefore confirmed as being in accordance with real and substantial justice.

D. Hull

DAVID HULL
CHIEF JUSTICE